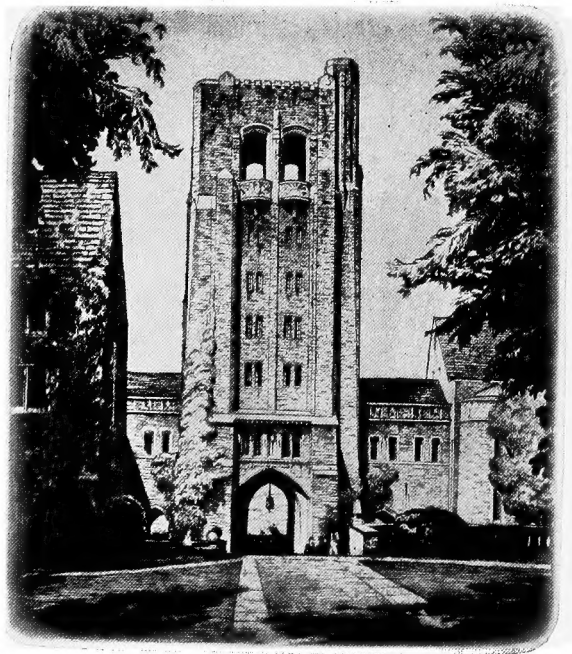


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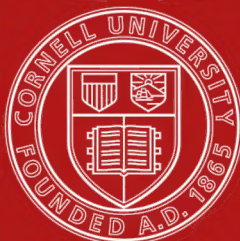
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THE  
INTERNATIONAL LAW  
OF  
RECOGNITION

*With Special Reference to Practice in  
Great Britain and the United States*

BY

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**TO MY PARENTS**





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## FOREWORD

ALTHOUGH Recognition has probably been more discussed among international lawyers in recent years than any other part of the international legal system, the controversy which still exists as to its nature and effects is a sufficient justification, if one should seem to be needed, for another book on the subject. For this controversy is more than a mere difference of opinion among lawyers as to the true rule of law on some particular question or questions; it reflects, as Dr. Chen writes in the opening words of this book, a 'fundamental cleavage between those who regard the State as the ultimate source of international rights and duties, and those who regard it as being under a system of law which determines its rights and duties'. That this is indeed the issue at stake between the adherents of the constitutive and those of the declaratory theory of Recognition is the guiding theme which runs through this book, and Dr. Chen has adduced powerful arguments to prove, firstly, that if the former theory is consistent with itself, it must logically lead to a denial of the obligatory character of international law, and, secondly, that the balance of authority in State practice and in the jurisprudence of courts is strongly in favour of the latter.

But Recognition is not only a subject of crucial importance from the point of view of international legal doctrine; it is also a matter of great and constantly recurring concern to foreign offices and to that growing body of international lawyers whose primary interest is in the practical application of the system. To these Dr. Chen's book will be useful for the full and scholarly examination which he has made of the abundant materials to be found in the practice of States, in judicial decisions, and in the literature of the subject. The evidence is often conflicting or indecisive, but if these defects are ever to be eliminated an indispensable preliminary step is the scientific determination of the law as it exists with all its imperfections and uncertainties. To that, I believe, Dr. Chen's book makes a valuable contribution.

Recognition is one of the topics which the International Law Commission recently established by the United Nations has

included in a list of topics on which it hopes in due course to prepare codifying drafts. The choice was almost inevitable, for under the head of 'codification' the Commission has been charged with the task of preparing 'the more precise formulation and systematisation of rules of international law in fields where there has already been extensive State practice, precedent, and doctrine', and Recognition obviously falls within this field. But even a cursory reading of Dr. Chen's book will show the difficulties of the task which the Commission proposes to undertake, and it would be unwise to look for quick results. There does seem, however, today to be a more general realisation that the improvement and extension of international law is a crying need of our time, and this seems to be combined with a fuller understanding than formerly of the necessity of supplying a solid foundation for the work. That foundation can only be provided by patient and thoroughly objective preparatory research work on the part of international lawyers on lines such as those which Dr. Chen has followed in this book.

After completing this book Dr. Chen was obliged to leave this country to take up the post of Associate Professor in the National Tsing Hua University, Peking, and he has therefore been unable to see the book through the press himself. Fortunately, the publishers were able to enlist the help of Mr. L. C. Green, Lecturer in International Law and Relations at University College, London. Mr. Green's task has been a heavy one, for besides the usual editorial work of verifying citations and preparing an index he has had to do his best to ensure that the text should be up to date on publication, and even in the short time since the book was completed much has happened in the world that is relevant to its subject matter. Dr. Chen has asked me to acknowledge on his behalf the debt that he owes to Mr. Green for the admirable way in which he has carried out this task.

J. L. BRIERLY.

*Oxford,*  
*April, 1951.*

## PREFACE

THE problem of recognition is, by general agreement, one of the most perplexing problems of international law. An attempt is here made to examine the various aspects of the problem in the light of British and American practice, and to induce therefrom certain underlying principles which may afford explanations for what might otherwise appear to be somewhat bewildering phenomena in international life.

The appearance of Professor Lauterpacht's *Recognition in International Law* at the final stage of this work, while setting the author the problem of the extent to which it had become redundant because of duplication, bears testimony, however, to the importance of the problem, and the possible divergence of points of view that justifies the completion of the work. Professor Lauterpacht's book is both an inspiration and a standard for the present author, although the conclusions reached here may not always be the same as those of the learned Professor.

The author would like to take this opportunity to acknowledge his indebtedness to Professor J. L. Brierly for the unfailing help and encouragement he has so freely given. The author congratulates himself on the enviable fortune of having worked under the guidance of so great an authority.

A word of thanks is also due to the British Council, without whose financial assistance the preparation of this work could never have been undertaken.

TI-CHIANG CHEN.

*Lincoln College, Oxford,*  
1947.



## EDITOR'S NOTE

AFTER completing the manuscript of this work, Dr. Chen returned to China. It was therefore impossible for him to see it through the Press and bring it up to date by including those cases and incidents which had arisen between the date of writing and the setting of the type. At the request of the Editors of the Library of World Affairs, I undertook the task of editing the manuscript for publication.

Any formal alterations I have made, for example, a reference to a newly published work, are embodied straight into the text or footnotes, as the case may be, without any indication to show that they have been added by me. But, since I was unable to discuss my suggestions with Dr. Chen, wherever I have made any material additions, such as the discussion concerning the recognition of Israel or Korea, I have indicated this fact by the use of square brackets.

I frequently found it necessary to approach the Legal Departments of His Majesty's Foreign Office and of the United States State Department for documentary information concerning recent cases of recognition. Whenever I did so, I found Sir Eric Beckett, K.C.M.G., K.C., and the United States authorities extremely willing to help, and I would like to take this opportunity to express my sincere thanks to them for all the information they so freely placed at my disposal. I would also like to thank Mrs. Rose Patterson Briggs, B.A., of the United States Information Service, American Embassy, London, for her willing assistance whenever I have asked her for information.

Finally, I must thank the Legal Adviser to the Israeli Foreign Office for having supplied me with copies of the letter of credence and other documents relating to the appointment of the first Israeli Minister to the United Kingdom.

L. C. G.

*University College, London,  
April, 1951.*



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# INTRODUCTION



## INTRODUCTION

IN the last analysis, the question of international recognition is but a reflection of the fundamental cleavage between those who regard the State as the ultimate source of international rights and duties and those who regard it as being under a system of law which determines its rights and duties under that law. According to the former view, as a State cannot be bound by any obligation except with its own consent, a new State or government or insurgent body cannot be allowed to exercise rights against existing States unless it has been recognised by them. It is therefore argued that recognition creates the legal status of the body recognised *vis-à-vis* the recognising State.

Such a view may serve the purpose of Machiavellian statesmen who put national interests above all others. It provides them with a justification for ignoring the existence of other entities and denying them rights under international law. But international law, like any other system of law, cannot be divorced from fact. The purpose of international law is to regulate the conduct of political entities in harmonious co-existence within a community. Such a purpose cannot be achieved if one of the entities should be free to liberate itself from the restraints of law with respect to other entities by simply refusing to recognise them. If an entity in fact exists, the refusal to treat it in accordance with international law would incur the same risks and perils as would be incurred had the treatment been refused to a recognised entity. [The source of rights and duties of an entity in international law is the fact of its actual supremacy within a specified area of territory over a specified portion of humanity, which enables it to exert physical pressure on all those who may choose to disregard its rights. This fact is the basis of international law.] The constitutive theory, in closing its eyes to this fact, indulges in the illusion that the rights of a Power, as long as it is not recognised, may be infringed with impunity. Such a theory is highly detrimental to international harmony and would defeat the purpose of international law. ✓

The contrary theory is to regard the rights and duties of new

States or governments or belligerent communities *vis-à-vis* other States as being determined by the fact of their actual existence. When they exist in fact, their rights and duties flow automatically through the operation of the law. Recognition by a foreign State signifies the intention of that State to treat the new entities according to law, and to deal with them in their recognised capacity. In the case of a new State or government, it would, moreover, entail the establishment of political relations with them. But non-recognition does not give the foreign State the right to treat the unrecognised Power as if it were beyond the pale of international law. As far as international law is concerned, the recognition is not creative, but declaratory. This applies equally to the recognition of States, governments and belligerent communities.

The theory which regards recognition as a conferment of rights is not so consistently applicable to all the three situations. Even in the question of State recognition, the constitutive view is confronted with theoretical difficulties. For instance, it completely fails to explain how the first States came into existence. In assuming that recognition is binding only *inter partes*, it is forced into the absurd conclusion that States can exist only in a relative sense. This consequently makes it difficult to explain how a body not itself existent in the eyes of another can perform an act which creates the legal personality of that other body.

The fundamental assumption of the constitutive view that the international community is in the nature of a closed club, to which new entities can only be admitted through recognition, is itself erroneous. It is certainly untrue to-day that any portion of humanity can be treated as beyond the protection of international law.

By assuming that a State, once having satisfied certain objective tests, *ipso facto* becomes a person in international law, the declaratory theory is spared the logical absurdities which embarrass constitutive writers. The acceptance of an objective test is, indeed, a strong argument for the view that a State acquires legal personality through the operation of the law, and not through recognition. The practice of States to regard recognition as retroactive can only be explained by the fact that the Power

recognised has always had existence prior to the recognition, and independently of it.]

The impossibility of the traditional constitutive theory has driven some of its adherents to seek for modifications of the theory. But these modifications are either inadequate to remedy the defects of the traditional theory, or approximate to the declaratory view so closely that they are practically indistinguishable from it.

The practice of States to accord premature recognition or to withhold recognition in consideration of political advantages, though often resorted to, has met with universal condemnation. The British and United States Governments have repeatedly declared it to be their fixed policy to recognise new States once they are in fact established.

As regards the recognition of governments, the declaratory principle applies with equal cogency. In the past, departures from this principle have been caused by considerations of legitimacy, either dynastic or constitutional. These, fortunately, have now ceased to be of practical importance. [The sole criterion ✓ whether a government is entitled to represent a State internationally is the fact of its actual paramountcy in the country. Considerations such as the willingness to fulfil international obligations may influence the decision of other States whether or not to enter into relations with it. But this does not entitle other States to deny it the right to govern. All that a foreign State can do is either to abstain from any intercourse with it, or to employ the ordinary measures of international pressure after the establishment of normal relations]

[An examination into the modes by which recognition may be ✓ accorded also furnishes convincing proofs that recognition does not constitute the personality of the State or its governmental capacity. For, apart from unilateral declaration, which is most uncommon, any other mode of recognition must presuppose the legal capacity of the party recognised. The test whether an act constitutes recognition is whether it signifies the intention of the recognising State to enter into political relations with the body recognised. For this reason, some acts, although they may presuppose the legal existence of a political entity, may not constitute recognition, so long as they do not require the plenitude



of relations normally existing between States. This explains what appears to be the contradictory conduct of States which, while entering into certain relations with a new entity, yet persistently maintain that no recognition is being accorded.

Although recognition does not constitute the legal status or capacity of the new Power, it nevertheless has very important political consequences. Recognition by a large number of powerful States tends to give stability to the régime and to assure its political position among nations. It is also strong evidence of the existence of the new régime. Such evidence is generally conclusive upon the organs of the recognising State, in particular, upon courts of those nations which adopt the doctrine of judicial self-limitation. In view of this political importance of recognition and the possibility of abuse, it would be desirable that recognition be accorded by means of collective action.

The above principle applies *mutatis mutandis* to the recognition of belligerency. Here, through recognition, a State declares the existence of a body which is so organised that it is capable of exercising the rights and fulfilling the duties of the law of war. These rights and duties flow directly from the existence of the organised Power and the fact of the civil war. The recognising State, by means of recognition, assumes the rights and duties incident to the fact of war. The consequences of a refusal to assume such rights and duties would be the same as in the case of a war fought between independent States. The practice of Great Britain and the United States fully supports this view.

The recognition of belligerency creates special difficulties for those who regard belligerent bodies as possessing no legal personality. Such a view runs counter to the principle that civil wars may be regulated by the same rules as those obtaining in international wars. As a matter of fact, a belligerent community, to become capable of exercising the rights of war, must necessarily be so organised as to be able to exercise the powers of civil government. The practice of States is generally to concede to it the validity of its acts of internal government. English courts in recent years have even gone so far as to regard it as a sovereign State for practical purposes.

As the status of belligerency is acquired through the fulfil-

ment of certain conditions of fact, a body of men in revolt which does not fulfil such conditions does not constitute a belligerent community, and therefore does not possess the legal status attached to it. The 'recognition' of insurgency has no effect upon the legal capacity of the insurgent body. It merely signifies that the fact of the insurrection is taken notice of by the foreign State, which would accordingly take measures of precaution and for the better fulfilment of its international obligations towards the troubled State.

Internationally, therefore, recognition does not affect legal rights and duties of the parties. An international tribunal would without hesitation adjudge to the parties concerned such rights as they would be entitled to, according to their actual existence, irrespective of whether one party has recognised the other.

For a national court, the question may be different. In countries which adopt the doctrine of judicial self-limitation, the courts are precluded from inquiring into the legality of the acts of the political department in accordance with the standard of international law. They apply the principles of international law only upon the assumption of the international validity of the acts of their governments. They are bound to accept as conclusive the statements of the government as regards international facts. In some countries, the government is even allowed to determine the question of law. As the government is generally guided by considerations of policy, the courts have often found themselves in the embarrassing predicament of having either to shut their eyes to facts or to act in disagreement with the government. Moreover, the government certificates are often couched in terms deliberately ambiguous. The result is that the law is thrown into confusion and uncertainty. Their embarrassing experience in cases concerning the Soviet Union has led United States courts and lawyers to adopt the more realistic course of giving effect to internal acts of unrecognised governments. It may be suggested that, with regard to private litigation, the ordinary principle of private international law which regards foreign law as a question of fact is quite adequate for the solution of the question. The strict adherence to the doctrine of judicial self-limitation to the extent of ignoring the internal acts of unrecognised Powers may inflict unnecessary hardships upon individuals and is contrary to the requirements of justice.

Recognition is both a declaration of fact and an expression of the intention to enter into political relations with the Power recognised. As a declaration of fact, it is both irrevocable and incapable of being subject to conditions; as an expression of the intention to enter into political relations, it is both revocable and capable of being subject to conditions. But in the latter case, revocation of recognition does not affect the legal existence of the recognised entity. Belligerent recognition cannot be conditional. The revocation of belligerent recognition is tantamount to taking sides in the struggle.

There has been some confusion regarding the expressions *de jure* and *de facto* recognition. Much of the discussion on that subject is beside the point, as those using the terms are seldom using them in the same meaning. It is suggested that a '*de jure* (or *de facto*) recognition' is indicative of the degree of the relation the recognising State intends to enter into with the recognised Power, and that 'recognition as a *de facto* government' indicates that the body recognised is a partial, as distinguished from a general, government. The indiscriminate use of the terms has led to the admission to the full status of statehood of bodies which are merely belligerent communities or foreign military occupants.

Some writers, in advocacy of the declaratory principle, have sought to apply the same logic to acts in breach of international law. They argue that, since the recognition of States, governments and belligerent communities is based upon the fact of their existence, a situation of fact brought about by a breach of law ought similarly to be recognised once it has become a *fait accompli*. It is submitted that the analogy does not exist. In the recognition of States, governments and belligerent communities, the situation of fact is not itself contrary to law. On the contrary, it is envisaged by international law, which gives it legal effect when it arises. But an act which is illegal cannot bring about legal consequences beneficial to the wrongdoer. A legal order cannot be maintained if every violation of the law immediately becomes a source of rights. The only ways by which an illegal act may be validated are through the recognition by the injured party or through the modification of the legal order itself. In advancing this argument, it is assumed that there exists in the international community a 'higher law' by which the

legality of acts of States can be tested, and that the international legal order, like any other legal order, is not immutable, but is subject to change in conformity to vital changes of fact, though prior to such a change pre-existing rights are protected by the force of the society in support of that legal order. Such assumptions, it is believed, are entirely in consonance with the basic assumptions of the declaratory theory of recognition with regard to States, governments and belligerency.



## PART ONE

### *RECOGNITION OF STATES*



## CHAPTER 1

### THE RECOGNITION OF STATES AND THE OBLIGATORY CHARACTER OF INTERNATIONAL LAW

**A**LTHOUGH the problem of the recognition of States has been the most discussed matter in the field of recognition, the question of recognition arises, in reality, in every vicissitude of State life. Whenever there is an outbreak of civil war, a change of government or a transfer of territory or other important changes, the question of recognition is immediately involved. Indeed, every public act of a State, whether legislative, administrative or judicial, which may come within the purview of a foreign State, depends for its validity within that foreign State upon the latter's recognition of it. In this broad sense, which is the only correct sense whereby the multifarious aspects of international life in which recognition comes into play can be shown in their proper perspectives, international recognition is a matter of everyday occurrence, although only the smallest fraction of it has attracted public attention. This truth is intelligible only when we realise that, in by far the greater number of cases, recognition is accorded as a matter of course, when conditions of international law have been met. In such cases, recognition as a distinct act is concealed from the public eye by the very reason of its obviousness.

Bearing this in mind, we shall limit our discussions to the more spectacular aspects of recognition, namely, the recognition of States, governments, belligerency and illegal acts. Among these, the recognition of States is of the most fundamental importance, for the controversy drives deep into some basic assumptions of international law.

#### § 1. THE RIVAL DOCTRINES OF RECOGNITION

The question of the international recognition of States has always been dominated by the controversy between two schools of



thought, namely, the constitutive and the declaratory schools. The principal tenet of the former school, as set forth by Oppenheim, is that 'A State is, and becomes, an International Person through recognition only and exclusively'.<sup>1</sup> The exponents of this view include Triepel,<sup>2</sup> Le Normand,<sup>3</sup> Liszt,<sup>4</sup> Lawrence,<sup>5</sup> Wheaton,<sup>6</sup> Anzilotti,<sup>7</sup> Professor Kelsen,<sup>8</sup> Redslob,<sup>9</sup> Bluntschli,<sup>10</sup> Professor Lauterpacht,<sup>11</sup> [and it seems Dr. Schwarzenberger, who bases his attitude on the practice of the Permanent Court of International Justice <sup>12</sup>].

The opposing theory is stated by Hall as follows:

'States being the persons governed by international law, communities are subjected to law . . . from the moment, and from the moment only, at which they acquire the marks of a State.'<sup>13</sup>

In other words, [whenever a State in fact exists, it is at once subject to international law, independently of the wills or actions of other States. The act of recognition declares the existence of that fact and does not constitute the legal personality of the State.] Prominent among the adherents of this view are Vattel,<sup>14</sup>

<sup>1</sup> Oppenheim, vol. I, p. 121. This theory, it may be remarked, has no application in the recognition of governments and belligerent communities, since, according to Oppenheim (*ibid.*, pp. 113-4), international personality is the exclusive attribute of States. Moreover, since, according to the constitutive theory, recognition is both the necessary and the sufficient condition for the full enjoyment of international rights by the State, recognition of the government of an already recognised State would seem to be theoretically redundant. Although Oppenheim asserts the essential similarity of the principles governing the recognition of States, governments and belligerency (*ibid.*, vol. II, p. 197), it appears that the same treatment is impossible under the constitutive theory. See *ibid.*, vol. I, p. 125, as to the principles regarding the recognition of governments. Le Normand admits that the constitutive theory does not apply to the recognition of governments, as it confers no juridical value (Le Normand, *La Reconnaissance Internationale et ses Diverses Applications*, 1899, p. 268).

<sup>2</sup> Triepel, *Droit International et Droit Interne*, 1920, p. 101.

<sup>3</sup> Le Normand, *op. cit.*, p. 9.

<sup>4</sup> Liszt, *Le Droit International*, 1927, pp. 52-3.

<sup>5</sup> Lawrence, *Principles of International Law*, 1937, p. 82.

<sup>6</sup> Dana's *Wheaton*, Pt. I, Ch. II, s. 21.

<sup>7</sup> Anzilotti, *Cours de Droit International*, 1929, vol. I, p. 192.

<sup>8</sup> Kelsen, *Recognition in International Law, Theoretical Observations*, 35 A.J.I.L. (1941), pp. 605, 608-9; but see below, p. 15, n. 21.

<sup>9</sup> Redslob, *La Reconnaissance de l'Etat comme Sujet de Droit International*, 13 R.I. (Paris), 1934, p. 429.

<sup>10</sup> Bluntschli, *Droit International Codifié*, 1870, s. 29.

<sup>11</sup> Lauterpacht, p. 75. The same view is also held by Hegel and Jellinek, see Lauterpacht, p. 38.

<sup>12</sup> [Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 1949, chapter 7, and *A Manual of International Law*, 1950, p. 27.]

<sup>13</sup> Hall, pp. 19-20.

<sup>14</sup> Vattel, *Law of Nations*, 1758, Bk. I, Ch. I, s. 4.

Westlake,<sup>15</sup> Moore,<sup>16</sup> Professor Brierly,<sup>17</sup> Williams,<sup>18</sup> Lorimer,<sup>19</sup> Professor Scelle<sup>20</sup> and many others.<sup>21</sup> It is also the view adopted by the Institute of International Law.<sup>22</sup>

There is a further group of writers who draw the distinction between the possession of international personality by a State and the exercise of international rights by that State. The following passage from Rivier may be regarded as representative:

*'L'existence de l'État souverain est indépendante de sa reconnaissance par les autres états. Cette reconnaissance est la constatation du fait accompli, et c'en est aussi l'approbation. C'est la légitimation d'une situation de fait, qui se trouve désormais fondée en droit. . . . La reconnaissance implique un engagement formel de respecter dans la personne nouvelle du droit des gens les droits et les attributions de la souveraineté. Ces droits et attributions lui appartiennent indépendamment de toute reconnaissance, mais ce n'est qu'après avoir été reconnue qu'elle en aura l'exercice assuré. Des relations politiques régulières n'existent qu'entre États qui se reconnaissent réciproquement.'*<sup>23</sup>

Similar views have been voiced by Fauchille,<sup>24</sup> Fiore,<sup>25</sup> Twiss,<sup>26</sup>

<sup>15</sup> Westlake, *International Law*, vol I, 1904, pp. 49-50.

<sup>16</sup> Moore, *Digest*, vol. I, pp. 18-19.

<sup>17</sup> Brierly, *Law of Nations*, 1949, p. 123; same, *Le Fondement*, p. 19; same, *Règles Générales du Droit de la Paix*, 58 *Hague Recueil*, 1936.

<sup>18</sup> Williams, *Aspects of Modern International Law*, 1939, pp. 26-7.

<sup>19</sup> Lorimer, *Institutes of the Law of Nations*, 1883, vol. I, p. 104.

<sup>20</sup> Scelle, *Précis de Droit des Gens*, 1932, vol. I, p. 98.

<sup>21</sup> These include Halleck, *International Law*, 1861, p. 75; Phillimore, *Commentaries upon International Law*, 1879, vol. II, p. 20 *et seq.*; Cobbett, vol. I, pp. 31-2; Baty, *Canons of International Law*, 1930, p. 204 *et seq.*; Erich, *La Naissance et la Reconnaissance des États*, 13 *Hague Recueil*, 1926, p. 431, at pp. 457-61; Nys, *Le Droit International*, 1912, vol. I, p. 74; same, *La Doctrine de la Reconnaissance des États*, 35 *R.I.*, 1903, p. 292; Jaffe, *Judicial Aspects of Foreign Relations*, 1933, p. 79; Kelsen, *Théorie Générale du Droit International Public*, 42 *Hague Recueil*, 1932, p. 121. Professor Kelsen's view has now been modified (see above, n. 8). Goebel accepts the declaratory view (*Recognition Policy of the United States*, 1915, p. 45), but adds a qualification that recognition has a 'definite juristic meaning' in that the recognising State 'will recognise to be binding upon itself those obligations which the new State has assumed' (*ibid.*, p. 61). See *contra*, below, pp. 37-8, 61-2.

<sup>22</sup> Article 1 of the Resolution of 1936, 30 *A.J.I.L.*, 1936, Supplement, p. 185. See also Project VI, Article 2 of the American Institute of International Law, 20 *A.J.I.L.*, 1926, Supplement, 310; Project II, Article 5 of the International Commission of Jurists, 22 *A.J.I.L.*, 1928, Supplement, p. 240.

<sup>23</sup> Rivier, *Principes du Droit des Gens*, 1896, vol. I, p. 57.

<sup>24</sup> Fauchille, *Traité de Droit International Public*, 1921, vol. I, Pt. I, p. 306.

<sup>25</sup> Fiore, *Droit International Codifié*, 1890, pp. 93-4, 96. His arguments are somewhat confused. While maintaining that a State is subject to international law as soon as it has juridical existence, he goes on to say that such a State has only an 'abstract personality', incapable of rights and duties, unless recognised, or unless it enters into *de facto* relations with other States.

<sup>26</sup> Twiss, *Law of Nations*, 1875, vol. I, pp. 19-20.

De Louter<sup>27</sup> and Professor Hyde.<sup>28</sup> [This distinction does not seem to be very helpful. It is difficult to imagine an entity possessing full legal personality and yet having its rights remain unexercisable until recognised by some other entity.<sup>29</sup>] Personality under such a disability would be devoid of meaning. There has been some doubt whether these writers are not in fact advocating a 'constitutivist' view.<sup>30</sup> In view of the clear statement of Rivier that the existence of a sovereign State is independent of recognition, this doubt is probably unjustified. [The most important point of departure between the constitutive and the declaratory theories lies in the question whether the legal personality of a State exists prior to recognition, that is to say, whether the unrecognised State can be a subject of international law, having capacity for rights and duties.] On this point, there is no doubt that these writers are in support of the declaratory theory.<sup>31</sup>

[The non-exercise of rights does not necessarily imply the lack of capacity,<sup>32</sup> and non-recognition does not prevent the exercise of rights.<sup>33</sup> To enter into treaties or diplomatic relations is neither an absolute right nor an absolute duty.] A State may refuse to enter into diplomatic relations with even a well-established State without thereby denying the latter's personality. A well-established State may also choose not to exercise certain of its rights, without denying itself personality. It is not believed that the State of Russia had lost its personality as the result of the severance of practically all diplomatic relations with other States during the early stage of the Soviet régime. [The establishment of diplomatic relations is a super-addition to international personality, and not the essence of it.] For this reason, those writers

<sup>27</sup> De Louter, *Droit International Positif*, 1920, vol. I, p. 218.

<sup>28</sup> Hyde, vol. I, p. 148.

<sup>29</sup> See criticisms on this point in Jaffe, *op. cit.*, pp. 88-9; Le Normand, *op. cit.*, p. 88.

<sup>30</sup> Fauchille and Moore have been classified among constitutivists by Erich (*loc. cit.*, p. 460), and Fiore by Goebel (*op. cit.*, p. 55). The last-mentioned classification was objected to by Jaffe (*op. cit.*, p. 88). Verdross thinks that if the exercise of external competence of a State depends upon recognition, recognition cannot be purely declaratory, *Règles Générales du Droit International de la Paix*, 30 *Hague Recueil*, 1929, p. 271, at p. 329.

<sup>31</sup> Rivier (*loc. cit.*), Fauchille (*op. cit.*, vol. I., Pt. I, p. 307), and De Louter (*loc. cit.*) have all been outspoken in their rejection of the constitutive view. Most of the writers mentioned above have been referred to by Lauterpacht as exponents of the declaratory view (p. 42).

<sup>32</sup> [Only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom' (obliging States to abstain), *Lotus case* (1927), Series A, No. 10, p. 28.]

<sup>33</sup> Cf. below, pp. 33-4.

who regard recognition as giving scope to the exercise of international rights already possessed by a new State must be considered as holding the declaratory view.

There is another group of writers, described by Professor Cavaré as *mi-constitutive, mi-declarative*.<sup>34</sup> These writers, in an effort to reconcile positive rules of law and social necessity, advance the argument that recognition is declaratory as regards certain minimum rights of existence, but constitutive as regards more specific rights. Such a view is in reality a rejection of the constitutive view, in so far as it regards States as capable, even in the absence of recognition, of enjoying rights, however limited, under international law.

## § 2. RELATIONS BETWEEN THE THEORIES OF RECOGNITION AND THE THEORIES OF THE OBLIGATORY CHARACTER OF INTERNATIONAL LAW

The theories of recognition are not independent growths, but are reflections of the more fundamental theories of the nature of international law. The value and validity of the former must be assessed and determined against the background of the latter.

[It is generally recognised that the constitutive theory is an outgrowth of the positivist school of international law. The positivist theory, postulating the consent of States as the basis of international law,<sup>35</sup> requires that not only the content of the law, but also the subjects thereof, should be subject to the consent of the States. This is necessary in order to ensure that no State shall be placed under any obligation to which it has not consented. Thus Le Normand speaks of the 'double recognition' of the law to be observed and the entities to submit to such a law.<sup>36</sup> The relation between the two matters is stated thus by Oppenheim: 'As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the Family of Nations.'<sup>37</sup> Triepel sees in recognition a

<sup>34</sup> These include Cavaglieri, Miceli, Romano, Fedozzi, Salvioli, Kelsen, Verdross, Kunz and Guggenheim (Cavaré, *La Reconnaissance de l'Etat et la Mandchoukouo*, 42 R.G.D.I.P., 1935, p. 1, at p. 53 *et seq.*).

<sup>35</sup> Oppenheim, vol. I, p. 121; Anzilotti, *op. cit.*, vol. I, pp. 44, 48.

<sup>36</sup> Le Normand, *op. cit.*, p. 32.

<sup>37</sup> Oppenheim, *loc. cit.* in note 35 above.

*Vereinbarung*, by which the recognising and the recognised bind themselves to observe the rules in force in the international community.<sup>38</sup> According to Anzilotti, since the juridical norms of international law are created by means of an agreement, the subject of the international juridical order commences the moment the first agreement is concluded. Recognition is considered as none other than the conclusion of a pact based upon the rule *pacta sunt servanda*.<sup>39</sup> This wedlock between positivism and 'constitutivism' dates back to Hegel, who may be regarded as the spiritual father of both doctrines, and it is no surprise that they should go hand in hand with each other.<sup>40</sup>

It is clear from the foregoing that the constitutive theory is in reality an extension of the positivist doctrine in the field of recognition. Strong as are the ties between the two doctrines, it is, however, incorrect to assume that all positivists are constitutivists, or *vice versa*. In fact, many adherents of the declaratory view are positivists.<sup>41</sup> Nevertheless, it is basically true that the constitutive theory relies for its validity upon the consensual basis of international law, and the predominance it enjoyed in the past has been the direct result of the vogue of State sovereignty.

In contrast to the positivist theory, the natural law theory is one which purports to furnish an explanation for the ultimate obligatory character of international law, apart from the wills of individual States.<sup>42</sup> In this theory, the declaratory doctrine of recognition finds a natural alliance. For to argue that a State can become a subject of international law without the assent of the existing States, it is necessary to assume the existence of an

<sup>38</sup> Triepel, *op. cit.*, p. 101.

<sup>39</sup> Anzilotti, *op. cit.*, vol. I. p. 161.

<sup>40</sup> Lauterpacht, p. 38. Although Professor Lauterpacht subscribes to the constitutive view (*ibid.*, p. 2), it does not seem that he is in agreement with the positivist doctrine. See his *The Function of Law in the International Community*, 1933, pp. 431-43. In fact, his insistence upon the legal nature of recognition has drawn him very close to the declaratory view (cf. below, pp. 50-1).

<sup>41</sup> See, for example, the positivist views of the following declaratory writers: Hall, pp. 2-5; Fauchille, *op. cit.*, vol. I, Pt. I, p. 8; Rivier, *op. cit.*, vol. I, p. 22; Hyde, vol. I, pp. 1, 4; De Louter, *op. cit.*, vol. I, pp. 16-7; Moore, *Digest*, vol. I, pp. 3, 5; Goebel, *op. cit.*, pp. 56-8. Westlake is classed by Salmond among positivists (*Jurisprudence*, 9th ed., 1937, p. 720, n.e.), but see below, pp. 25, 26, n. 77. Kunz even goes so far as to say that all declaratory writers are positivists (Lauterpacht, p. 3).

<sup>42</sup> See Hershey, *History of International Law since the Peace of Westphalia*, 6 A.J.I.L., 1912, p. 30; Humphrey, *On the Foundations of International Law*, 39 A.J.I.L., 1945, p. 231, at pp. 231-4; also below, pp. 26-7.

objective system of law to which the new State owes its being. The existence of such a system of law is the basic condition for the validity of the declaratory theory.

### § 3. POSITIVISM EXAMINED

The positivist doctrine has its theoretical foundation in the idea of the sovereignty of States. The sovereign States, unleashed from the unifying forces of the Empire and the Church, have, since the Peace of Westphalia, asserted themselves to be all-supreme, repugnant of external restraints. Fortunately, the very circumstances which called forth the theory of sovereignty also gave rise to its antithesis: the necessity of setting up some rules of conduct to enable States equally sovereign to deal with one another. These rules constitute the law of nations. But how can sovereign States, supposedly not under any external restraint, be subject to the rule of law? In order to seek an explanation for the existence of such a law without giving offence to the doctrine of sovereignty, writers have resorted to the expedient of positivism. By contending that international law is binding upon the State because it consents to be bound, it is thought that a reconciliation can be brought about between freedom and organisation.<sup>43</sup>

It has now been increasingly realised that this conception of sovereignty is false, not only historically, but also analytically. A State is merely an institution, 'that is to say, a system of relations which men establish among themselves for securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on'.<sup>44</sup> They possess no more inherent sanctity or finality than the multitude of other

<sup>43</sup> For the reception of positivism in British courts, see *R. v. Keyn* (1876), 2 Ex. D. 63, 131, 154, 202; Lord Russell of Killowen's definition of international law (12 L.Q.R. 1896, p. 313), adopted by Alverstone, L.C.J., in *West Rand Central Gold Mining Co. v. The King* [1905], 2 K.B. 391, 407; *Matter of an Arbitration Between the Osaka Shosen Kaisha and the Owners of the S.S. Prometheus* [1906], 2 Hong Kong Law Reports, 207, 225, printed in *Cases*, pp. 33-4.

For its reception in American courts, see *Ware v. Hylton* (1796), 3 Dall. 199, 227; *The Antelope* (1825), 10 Wheat, 66, 122; *The Scotia* (1871), 14 Wall, 170, 187. This influence is also noticeable in the judgment of the Permanent Court of International Justice in the *Lotus* case (1927), Series A, No. 10, p. 18. For discussions on this question, see Salmond, *op. cit.*, 10th ed., 1947, pp. 32-3; Holland, *Lectures on International Law*, 1933, pp. 24-7; Pollock, *The Sources of International Law*, 18 L.Q.R. 1902, p. 418, at p. 419; Hershey, *loc. cit.*, pp. 34-7.

<sup>44</sup> Brierly, *Law of Nations*, 1949, p. 111.

institutions which men, for the satisfaction of their various needs, have organised among themselves. The notion of sovereignty was intended by its original inventors as an explanation of the internal authority within a State, with practically no regard to the relations of States with one another.<sup>45</sup> The sovereign is one who determines the competence of others, but whose competence is not determined by others. This idea cannot exist in a community in which there are two or more such sovereigns: if the one is, the other cannot be, a sovereign. It is incompatible with the notion of law, for the function of law is to delimit the competence of its various subjects.<sup>46</sup> 'Sovereignty', writes Sir John Fischer Williams, 'is only a name given to so much of the international field as is left by law to the individual action of States. What is sovereignty is not law; what is law is not sovereignty. All law is based on an abandonment of sovereignty, "that man may obtain justice he gives up his right of determining what it is, in points the most essential to him".'<sup>47</sup>

Since the co-existence of States and their dealings with each other in accordance with rules of law are undeniable facts, to support a theory of absolute sovereignty in the face of such facts would be to dwell in a world of unrealities. Positivism, whatever function it has fulfilled in the development of international law, is no longer consistent with social realities, and is certainly not, to say the least, conducive to peace and order in the present-day world. Its effort to reconcile the sovereignty of the State with the rule of law is an impossible task. Apart from its reliance upon the theory of sovereignty, which must be rejected, the positivist doctrine itself is insufficient as a theoretical explanation of the binding force of international law. To place international law upon a consensual basis, it is absolutely necessary to hold that a State has not merely the right to give consent, but also the right to withhold or withdraw it at will. But 'a law which a subject can take up and put down as suits his convenience is not law in any true sense'.<sup>48</sup> No writer of distinction has ever given support to a theory of the right of States to withdraw their consent to a

<sup>45</sup> Keeton, *National Sovereignty and International Order*, 1939, p. 37 *et seq.*

<sup>46</sup> Brierly, *op. cit.*, p. 47; Scelle, *op. cit.*, vol. I, pp. 13-4, 77.

<sup>47</sup> *Op. cit.*, p. 26; also Krabbe, *L'Idée Moderne de l'Etat*, 13 *Hague Recueil*, 1926, p. 513, at p. 576.

<sup>48</sup> Williams, *op. cit.*, p. 62.

rule of international law universally established.<sup>49</sup> This principle of the irrevocability of consent is obviously inexplicable by any theory of consent. To say that the State has itself given its consent to such a principle is to argue in a circle.

The positivist theory which relies upon the maxim *pacta sunt servanda*, such as that held by Professor Kelsen, Verdross<sup>50</sup> and Anzilotti,<sup>51</sup> indeed, explains the binding force of treaties, but leaves completely unexplained the binding force of the basic substratum of customary norms, of which the maxim is one.<sup>52</sup> The maxim forms a sort of superior norm, from which all other norms emanate. But it is itself an *a priori* assumption, anterior and superior to law, having its origin in political and moral circumstances but not admitting of a juridical explanation.

The theory is open to other criticisms. It is unable to account for the obligatory force of customary international law, except by resorting to the questionable artificiality of 'tacit consent'.<sup>53</sup> It fails to explain, as Professor Lauterpacht points out, the existence of those 'generally recognised principles of law to which States have only recently granted express recognition, but which, even apart from the constant practice of States, necessarily form part of international law'.<sup>54</sup> It is not uncommon for rules to be binding upon States without any form of consent expressed by or imputed to them. Modern 'law-making treaties' have often been regarded as constituting an exception to the maxim *pacta tertiis*

<sup>49</sup> States wishing to liberate themselves from international obligations have often resorted to various pretexts, such as the doctrine *rebus sic stantibus* or vital change of circumstances (Russian note of October 31, 1870, denouncing the Black Sea Clause of the Treaty of Paris, 1856, Hertslet, *Map of Europe by Treaty*, vol. 3, pp. 1892-5), the doctrine of necessity (opinions of the British Queen's Advocates cited in McNair, *Law of Treaties*, 1938, pp. 233-41) or the doctrine of self-preservation (Hall, p. 415), but never on the ground that the previous consents are revocable at will. See the Protocol of London, 1871, in which the Powers reaffirmed the principle of the irrevocability of consent (Hertslet, *op. cit.*, p. 1904).

<sup>50</sup> This view has now been abandoned by these writers (Kunz, *The Meaning and Range of the norm 'pacta sunt servanda'*, 39 A.J.I.L., 1945, p. 180, at p. 181).

<sup>51</sup> Anzilotti, *op. cit.*, vol. I, pp. 43-4.

<sup>52</sup> See Kunz, *loc. cit.*, p. 181.

<sup>53</sup> Lauterpacht, *The Function of Law in the International Community*, 1933, p. 421; Starke, *Monism and Dualism in the Theory of International Law*, 17 B.Y.I.L., 1936, pp. 66, 73; below, p. 24.

<sup>54</sup> Lauterpacht, *ibid.*



*nec nocent nec prosunt*.<sup>55</sup> The applicability of such conventional rules to non-signatories must necessarily be a rebuff to the consent theory.

It may be further argued that in erecting the maxim *pacta sunt servanda* into the sole source of the obligatory force of international law, Anzilotti's theory inevitably fails to provide a valid solution for the conflict of treaties with one another or with customary international law. The validity of a treaty or a rule can only be tested by a rule of a higher hierarchy than itself. If all treaties and rules derive their obligatory force from the only source, the *pacta*, they will all have equal force, and a conflict between them would not admit of any solution. Nor is it possible under that theory to determine whether a treaty, as such, is a valid one, whether the parties have capacity, whether rules of procedure and formal validity have been met, and whether or not vitiating circumstances, such as the illegality of objects, exist.<sup>56</sup> Rules determining such questions do in fact exist.<sup>57</sup> Their existence and operation must necessarily be left unexplained by Anzilotti's theory.

The elevation of the principle *pacta sunt servanda* into an initial hypothesis predicates the recognition of a legal order exterior and superior to the wills of States.

'So long as the binding force of this basic postulate is assumed', writes Professor Lauterpacht, 'the view that international law is a "system of promises" is only of secondary importance. The rule *pacta sunt servanda* confronts States as an objective principle independent of their will. . . . It does not matter whether the rule *pacta sunt servanda* is juridical or pre-legal; whether it is imposed as a matter of juridical construction or as a clear generalisation from the actual practice and legal convictions of States. The result is the same. . . . In both cases

<sup>55</sup> See below, p. 437, n. 44. [It is controversial, however, how far the rules affecting so-called 'law-making treaties' differ from those regulating other treaties. See Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 1949, pp. 529-30; cf. also Advisory Opinion of P.C.I.J. on *Status of Eastern Carelia* (1923), Series B, No. 5, pp. 27-8, *cx.* Advisory Opinion of I.C.J. on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), *I.C.J. Reports* 1949, p. 174 at p. 185. *Cx.* Jessup, *A Modern Law of Nations*, 1948, p. 134.]

<sup>56</sup> See below, pp. 437-8.

<sup>57</sup> See McNair, *op. cit.*, chapters III, X-XII, XIV; Oppenheim, vol. I, pp. 805-8; Schwarzenberger, *op. cit.*, n. 55 above, chapters 21, 23.

the basic rule constitutes a command, *i.e.*, a rule existing independently of the will of the parties.' <sup>58</sup>

Other forms of consent theory meet practically the same difficulty, they either have to argue that the consent is revocable or that it is not. In the former case, it is to deny the obligatory force of international law. In the latter case, it is to accept a superior legal order over and above the State. The former situation may be exemplified by the 'auto-limitation' theory of Jellinek, and the latter by the *Vereinbarung* theory of Triepel.

According to Jellinek, international law is the product of the act of self-limitation by the State. The State, being the ultimate authority which gives legal force to international law, is entitled to disengage itself at any time by changing the law.<sup>59</sup> Although Jellinek insists upon the objectively binding force of international law,<sup>60</sup> his admission that the self-imposed limitation is susceptible of being discarded cannot but be a negation of that binding force.<sup>61</sup>

Triepel's doctrine is also based upon the fundamental idea that a State is bound by international law only as the result of its own will. Unlike Jellinek, Triepel starts out with the intention of finding a rule of law above the subjects to whom it applies. Such a law is a declaration of a superior will and cannot be changed by the individual wills of the States. But in a community of States which are independent of one another and do not submit to any superior authority, how can a law above the State be created? Triepel finds the answer in the *Vereinbarung* which, as distinguished from a contract, is 'a fusion of different wills having the same content'.<sup>62</sup> By this process, the individual wills of States merge into a common will and constitute a binding law above the individual wills. A State, once it has entered into the *Vereinbarung*, is no longer permitted to liberate itself from the obligations of the common will. Thus, the individual wills of States, though expressing themselves during the formation of the

<sup>58</sup> Lauterpacht, *op. cit.*, p. 419; also Brierly, *op. cit.*, p. 54.

<sup>59</sup> Lauterpacht, *op. cit.*, p. 410.

<sup>60</sup> See Cavaglieri, *Règles Générales du Droit de la Paix*, 26 *Hague Recueil*, 1929, p. 321.

<sup>61</sup> Lauterpacht, *op. cit.*, p. 412; Brierly, *op. cit.*, pp. 54-5; same, *Le Fondement*, pp. 20-2.

<sup>62</sup> Triepel, *op. cit.*, p. 49. This corresponds to Le Normand's distinction (*op. cit.*, p. 132) between the declaration of will and the accord of wills.

common will, are not the source of international obligations. International obligations are derived from the common will expressed in the *Vereinbarung*. Triepel further admits that it is impossible to explain why the *Vereinbarung* is binding, and that his argument proves the impossibility of a general international law. As to the first point, like Anzilotti, he argues that there must be a point at which the *juridical* explanation of the obligatory character of law becomes impossible. 'The "basis" of the validity of law is outside the law.'<sup>63</sup> As to the second point, since it is impossible to show the existence of a *Vereinbarung* in which all the States take part, such international law as exists can only be particular international law binding on those who have taken part in its creation.<sup>64</sup>

✓ Triepel's theory seems to have gone one step further than that of Anzilotti, in not only acknowledging the superior character of the initial hypothesis, but also in regarding as *above* the States the rules derived from the operation of that hypothesis. The consent of the State is merely a process through which a rule of international law is created, but the source of its binding power lies elsewhere and is not susceptible of explanation. This being so, even if there had been, historically or hypothetically, a time in which the State was sovereign and unlimited by law, that state of affairs has definitely ceased to exist, as soon as the State concluded its first *Vereinbarung* with other States. Then, it can hardly be urged that States, as they are today, are not subject to an objective system of law, independent of their individual wills.

It is common for those who seek to place international law upon a consensual basis to explain the binding force of customary rules by resorting to the theory of 'tacit consent'.<sup>65</sup> But to base customary law on tacit accord involves a greater feat of reasoning than merely to assume that all contracts are binding. For, apart from accepting that assumption, it is necessary to demonstrate how an act, without ostensibly expressing a particular will, can be deemed to have the effect of having expressed such a will. The theory of tacit accord must first of all presuppose the existence

<sup>63</sup> Triepel, *op. cit.*, p. 81.

<sup>64</sup> See criticisms in Brierly, *Le Fondement*, pp. 22-4; Lauterpacht, *op. cit.*, pp. 415-6.

<sup>65</sup> Anzilotti, *op. cit.*, vol. I, pp. 73-6; Triepel, *op. cit.*, p. 90; Cavaglieri, *loc. cit.*, p. 362.

of a law which attributes to an act the effect of having expressed a particular will on a particular matter.

In municipal systems, a custom, to be binding on an individual, does not require the assent of that individual; it is enough that it has received general assent, the opinion of any particular individual notwithstanding. This principle seems also to have been accepted in international law. In cases where it is doubtful whether a particular State has assented to a particular generally accepted rule of international law, it has been held that the assent may be presumed.<sup>66</sup> Where a great majority of leading Powers have agreed to a certain custom, the dissension of a few minor States would be inconsequential.<sup>67</sup> Occasionally, a rule is considered as binding even upon States which have expressly rejected it.<sup>68</sup>

The word 'consent'<sup>69</sup> need not be strictly construed. In order that a rule may become international law, it is not necessary that each and every State should express its consent; it is sufficient that a 'general consensus' is achieved. Thus Westlake writes:

'When one of these rules (of international law) is invoked against a State, it is not necessary to show that the State in question has assented to the rule either diplomatically or by having acted on it, although it is a strong argument if you can do so. It is enough to show that the *general consensus* within the limits of European civilisation is in favour of the rule.'<sup>70</sup>

Even Oppenheim is obliged to concede that

'“Common Consent” can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever and disappear totally from the view of one who looks for the will of the

<sup>66</sup> See *West Rand Central Gold Mining Co. v. The King* [1905], 2 K.B. 391, 406-7.

<sup>67</sup> See *The Paquete Habana* and *The Lola* (1900), 175 U.S. 677, 708; Hyde, vol. I, p. 8, n. 1; Pollock, *loc. cit.*, p. 418.

<sup>68</sup> Although Latin American States have rejected the rules establishing an objective minimum standard for the treatment of foreigners, these rules have nevertheless been applied to them by international tribunals (Humphrey, *loc. cit.*, p. 237).

<sup>69</sup> The term itself is ambiguous and vague. See Salmond, *op. cit.*, 9th ed., p. 721.

<sup>70</sup> Westlake, *Collected Papers of John Westlake on Public International Law*, 1914, p. 78 (italics added); same, *International Law*, 1910, vol. I, p. 16.

community as an entity in contradistinction to the wills of its single members.’<sup>71</sup>

If ‘consent’, which is the basis of international law, means ‘general consensus’, in which the individual wills of any particular State are negligible, it is really another way of saying that States are subject to international law, regardless of their consent.<sup>72</sup> ‘Consent’, so interpreted, may be said to be the basis of municipal law, as well.<sup>73</sup> Oppenheim has, in fact, said that ‘Common consent is the basis of *all* law’.<sup>74</sup> We are probably coming to a point where positivist and naturalist doctrines converge.

#### § 4. LAW ABOVE THE STATES

The analysis of the positivist doctrine leads to the conclusion that this doctrine is faced with two alternatives, either to presuppose an objective juridical order above the State, thereby renouncing its claim as a legal theory, or to reject the binding force of international law, thereby amounting to a negation of international law *qua* law. Both of these would defeat the purpose of supplying an explanation for the obligatory character of international law. The naturalists, on the other hand, have offered several explanations. Some seek to explain the obligatory character of international law by the ordinance of the Divine Will<sup>75</sup>; some by the inherent nature of the State<sup>76</sup>; some by the biological and social necessity of human nature<sup>77</sup>; and still others

<sup>71</sup> Oppenheim, vol. I, p. 17. Roxburgh, however, refuses to regard a rule as law with respect to the State which has not assented to it. He only concedes that for practical purposes the dissenting State may be neglected (Roxburgh, *International Conventions and Third States*, 1917, s. 66).

<sup>72</sup> It is believed by some that a State may also be bound by treaties to which it is not a party (below, p. 437, n. 44).

<sup>73</sup> Pollock, *A First Book of Jurisprudence*, 1929, p. 30.

<sup>74</sup> Oppenheim, *op. cit.*, p. 16 (italics added). This writer became more and more inclined to the naturalist views in his later years (Lauterpacht, *op. cit.*, p. 404, n. 1).

<sup>75</sup> Halleck, *op. cit.*, pp. 42-6; Phillimore, *op. cit.*, vol. I, Preface, pp. xv-xvi, 15.

<sup>76</sup> Phillimore thinks that the necessity of mutual intercourse is the basis of international law (*ibid.*, Preface, p. xv). Sir Cecil Hurst speaks of international law as ‘the necessary concomitant of statehood’ (*The Nature of International Law and the Reason why it is Binding on States*, 30 *Grotius Transactions*, 1945, p. 119, at p. 125).

<sup>77</sup> Scelle, *op. cit.*, vol. I, p. 31. Westlake attributes to the social nature of man the existence of the juridical conscience which transcends State frontiers (*Collected Papers of John Westlake*, pp. 78, 81).

by the juridical consciousness<sup>78</sup> and the juridical nature<sup>79</sup> of the international community. These views, obsolete as some of them may sound, reflect one fundamental truth, which itself is unassailable: that is, the existence in the international community of a legal order to which States are subject, and which they are not free to reject at will. Such a society of States may seem rudimentary, as compared with intra-State societies; nevertheless, its existence is real. This idea has been mildly put with all safeguards against undue over-optimism by Professor Brierly:

‘But only a very gloomy pessimist would fail to recognise that common moral and cultural standards do exist internationally, that they influence conduct between nations and that this community of sentiment, imperfect though it is, affords some basis for law.’<sup>80</sup>

These views are valuable as a corrective to the cult of State-worship and the inflexible logic of the theory of sovereignty. They bring home the fundamental truth that the historic unity of Christendom<sup>81</sup> and the jurisprudential unity of the Roman law<sup>82</sup> have not been completely lost through the centuries. The refutation of consent as the basis of international law does not mean that consent has no place at all in international law. The argument is merely that the consensual theory is inadequate as an explanation. No one can deny the part played by the consent of States in formulating, substantiating and modifying international

<sup>78</sup> Krabbe, *loc. cit.*, p. 577. Liszt, though maintaining that the will of the international community is the union of wills of States (*op. cit.*, p. 8), nevertheless agrees that ‘*Le droit international a pour fondement la conscience juridique commune des états civilisés*’ (*ibid.*, p. 12). His view has undergone some change in the 11th edition of his work, in which he admits that the law of the State and international law are of the same nature (Lauterpacht, *op. cit.*, p. 432, n. 3). See also, Bluntschli, *op. cit.*, s. 4.

<sup>79</sup> Westlake, *op. cit.*, p. 3; Lauterpacht, *op. cit.*, pp. 422-3; Goodhart, *The Nature of International Law*, 22 *Grotius Transactions*, 1936, p. 31, at pp. 40-1.

<sup>80</sup> Brierly, *Law of Nations*, 2nd edition, 1942, p. 35. [In the fourth edition, 1949, Professor Brierly points out that ‘some . . . nations . . . are inclined to look on international law as an alien system which the western nations, whose moral or intellectual leadership they no longer recognise, are trying to impose upon them, and in effect they have begun to claim the right to select from among its rules only those which suit their interests or which arise out of agreements to which they themselves have been parties. . . . The result of positivism has been to secularise the whole idea of law and thus to weaken the moral foundation which is essential to the vitality of all legal obligation’ (pp. 44, 45).]

<sup>81</sup> Holland, *op. cit.*, p. 16 *et seq.*

<sup>82</sup> Maine, *International Law*, 1915, pp. 17-8.

law.<sup>83</sup> Neither can one deny the fact that the consent of States has been directly instrumental in the creation of the rapidly developing rules of conventional international law, or that to impose a new rule of law against an unwilling State would involve tremendous hazards and difficulties.<sup>84</sup> Credit must also be given to positivism for keeping us reminded of what the law is and how far it is from complete. 'The real contribution of positivist theory to international law', writes Professor Brierly, 'has been its insistence that the rules of the system are to be ascertained from observation of the practice of States and not from *a priori* deductions. . . .'<sup>85</sup>

The relative position of positivism and naturalism in international law is well illustrated in the Hague Conventions and the Statute of the World Court. In the Preamble of the Convention on The Laws and Customs of War on Land it is stated:

'Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, *from the laws of humanity, and the requirements of the public conscience.*'<sup>86</sup>

Article 38 of the Statute of the World Court stipulates as sources of international law: (a) international conventions, (b) international customs, (c) the general principles of law recognised by civilised nations, and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>87</sup> The

<sup>83</sup> 'International law, as understood among civilised nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent' (*Dand's Wheaton*, Pt. I, s. 14). Similarly, see Van Ness, J., in *Johnson v. Twenty-one Bales* (1832), 2 Paine 601, 604 (or *Cases*, p. 12, n. 7); Story, J., in *United States v. The Schooner La Jeune Eugenie* (1822), 2 Mason (Mass.), 409 (*ibid.*, p. 16).

<sup>84</sup> Brierly, *Le Fondement*, p. 24.

<sup>85</sup> Brierly, *Law of Nations*, 1949, p. 55; [cf. also Hyde, vol. I, Foreword, pp. vii-ix; and see Schwarzenberger, *The Inductive Approach to International Law*, 60 H.L.R., 1947].

<sup>86</sup> Higgins, *Hague Peace Conferences*, 1909, pp. 209-11 (our italics).

<sup>87</sup> Hudson, *The Permanent Court of International Justice*, 1920-1942, 1943, p. 677. [See also Schwarzenberger, *op. cit.*, n. 55 above, chapter 2; and Sørensen, *Les Sources du Droit International*, 1946.]

inclusion of the general principles of law is significant. 'Its inclusion', writes Professor Brierly, 'is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent.'<sup>88</sup> Sir John Fischer Williams thinks that 'These general principles come very near to that natural law or law of nature'.<sup>89</sup> Professor Lauterpacht has shown how, through the application of these sources of law, the Permanent Court succeeded in evolving rules of international law independently of the wills of individual States.<sup>90</sup> The existence of such rules is a strong argument for the declaratory theory of recognition.

<sup>88</sup> Brierly, *op. cit.*, p. 64; [cf., however, Schwarzenberger, *op. cit.*, p. 19 *et seq.*; Sørensen, *op. cit.*, chapter 6.]

<sup>89</sup> Williams, *op. cit.*, p. 49.

<sup>90</sup> Lauterpacht, *The Development of International Law by the Permanent Court of International Justice*, 1934, pp. 10-2.



## CHAPTER 2

### THEORY OF THE RECOGNITION OF STATES

#### § 1. RECOGNITION AND THE INTERNATIONAL PERSONALITY OF STATES

THE basic conception of the constitutive theory, as shown above,<sup>1</sup> is that, although a State may exist in fact, it does not exist in international law until recognised. What, then, one would ask, is the condition of a 'State' which is 'non-existent' in international law? Some think that it exists from the point of view of constitutional law; others that it exists *de facto*, but not juridically.<sup>2</sup> Constitutive writers seem to agree that, although without an international personality, a State may nevertheless have 'existence'. Even the most convinced of the constitutivists have not claimed for recognition the effect of 'creating' the State.<sup>3</sup> [What is claimed for it is merely the conferment upon an *already existing State* of an international personality, a quality to act in the international sphere productive of legal results. It is therefore necessary for writers of the constitutive school to draw the distinction between a State and an international person.<sup>4</sup>] Thus Oppenheim writes:

'... Statehood alone does not imply membership of the Family of Nations.<sup>5</sup> There is no doubt that Statehood itself is independent

<sup>1</sup> Above, p. 3.

<sup>2</sup> See Hobza, *La République Tchécoslovaque et le Droit International*, 29 R.G.D.I.P., 1922, p. 385, at p. 389; rejected in Erich, *loc. cit.*, note 21 above, p. 15, at p. 467.

<sup>3</sup> The Congo Free State has often been cited as an example of the creation of States through recognition (*ibid.*, pp. 448-9; Le Normand, *op. cit.*, note 3, p. 14 above, p. 264). For contrary view, see Nys, *loc. cit.*, n. 21, p. 15 above, p. 294. As regards the creation of the Vatican City, see below, p. 76.

<sup>4</sup> The term 'international person', or 'person in international law', has been used interchangeably with 'subject of international law' and 'member of the family of nations'. But for those who admit entities other than States as international persons, it is necessary to distinguish between international persons and members of the Family of Nations, the latter being reserved for States only (*Keith's Wheaton*, vol. I, p. 48). In the present discussion the State alone being concerned, this distinction is immaterial.

<sup>5</sup> Oppenheim, vol. I, p. 121.

of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition.’<sup>6</sup>

It is difficult to accept this distinction. When it is said that ‘International Law does not say that a State is not in existence’, in what sense is the word ‘existence’ used? Unless it is used in the international law sense, international law ought to say that the State does not exist. If international law does not say that the State is not in existence in the international law sense, it would hardly be proper for it not to take notice of it.

Moreover, the word ‘State’, used as meaning a full-sovereign State, cannot but have an international significance. ‘Sovereignty’, as defined by Oppenheim, is ‘supreme authority, an authority which is independent of any other earthly authority . . . independent all round, within and without the borders of the country.’<sup>7</sup> Independence is the opposite of subjection or subordination. What is independence to one is abstention from interference to others. [A society can exist as a sovereign ‘State’ only when it enjoys this independence *vis-à-vis* other States, that is to say, independence in the sense of international law. Therefore to say that a State ‘exists’, but is not a subject of international law, is a contradiction in terms.] [Westlake, however, states that ‘it is not necessary for a state to be independent in order to be a state of international law’.<sup>8</sup>]

Some writers who deny that a State can be considered *ipso facto* a subject of international law are, however, inclined to admit that such human associations as member-States of a federal union, vassal States, protectorates, the British Self-Governing Dominions (even prior to 1931), mandates and trust territories, which lack certain essential attributes of sovereignty, may be considered as international persons for some purposes.<sup>9</sup> It is difficult, then, to see why a sovereign State, by definition independent and supreme in itself, should be denied international personality.

<sup>6</sup> Oppenheim, vol. I, 5th ed., 1937, p. 120. Similarly, Liszt, *op. cit.*, note 4, p. 14 above, p. 53. [See also Charter of the Organisation of American States, signed at Bogotá, 1948: ‘The political existence of the State is independent of recognition by other States’ (Article 9), 18 Dept. of State *Bulletin*, 1948, p. 666.]

<sup>7</sup> Oppenheim, vol. I, 5th ed., p. 113; Le Normand, *op. cit.*, p. 70.

<sup>8</sup> [International Law, 1910, vol. I, p. 21.]

<sup>9</sup> Oppenheim, vol. I, p. 165 *et seq.*; see also Schwarzenberger, *op. cit.*, n. 55, p. 22 above, chapter 5.

Some writers, with a view to reconciling the fact of State existence with the constitutive theory, have ingeniously put forward the distinctions between internal and external sovereignty<sup>10</sup>; between the possession and the exercise of sovereignty<sup>11</sup>; between abstract and real existence<sup>12</sup>; and between existence as a member of the human society and existence as a member of the society of nations.<sup>13</sup> [The common character of their arguments is that a State existing in isolation, although theoretically it is capable of possessing rights, has in practice no occasion for exercising them. This aptitude for rights, or this personality, even if conceded, is abstract, because the State is unable to put it into operation and to make it felt by other States. In order that its existence may be real and its rights exercisable it is necessary that the State should be admitted into the international community through recognition.] '*Admettre dans la société des Etats*', writes Le Normand, '*c'est faire sortir de l'existence purement abstraite et de fait pour appeler à l'existence juridique.*'<sup>14</sup>

In another place, a more forceful argument is advanced. It is argued, in effect, that, since only subjective rights can constitute personality, and since personality can only be concrete, never abstract, to acquire a personality at all, a State must be admitted into the international society through recognition.<sup>15</sup>

It is difficult to agree with this view. [Even if assuming that all rights, to constitute personality, must be subjective (a proposition which will be rejected below), it is still far from proving that recognition, *as such*, can directly give rise to any subjective rights. Subjective rights are acquired through the actual entering

<sup>10</sup> Pradier-Fodéré and Foignet, cited in Le Normand, *op. cit.*, pp. 8-9 and 35; Keith's *Wheaton*, vol. I, pp. 42-6; Fauchille, *op. cit.*, note 24, p. 15 above, vol. I, Pt. I, p. 306. See for the rejection of this distinction, above, p. 31.

<sup>11</sup> See above, p. 5.

<sup>12</sup> Fiore, *op. cit.*, note 25, p. 15 above, Article 48.

<sup>13</sup> Carnazza-Amari, cited in Le Normand, *op. cit.*, p. 16; Kunz, cited in Cavaré, *loc. cit.*, note 34, p. 17 above, p. 59.

<sup>14</sup> Le Normand, *op. cit.*, p. 37; also Fiore, *op. cit.*, Article 35. [Article 6 of the Bogotá Charter, 1948 (see n. 6 above), however, states that, 'Even before being recognised, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and, consequently, to organise itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.']

<sup>15</sup> Le Normand, *op. cit.*, p. 81.

into relations, which may or may not take place after recognition. The extent to which States enter into relations with other States is always a matter of degree and policy. In this sense, the personality of one State is bound to be more or less 'abstract' than another. Recognition, as such, does not make it 'concrete'.

Moreover, to sustain the argument that the personality of a State cannot be concrete without being admitted into the society of nations, it is further necessary to maintain two propositions, both of which fail upon analysis: first, that *all* rights of a State must result from its entering into active relations with other States in the society of nations; secondly, that membership of this society is restricted, and admission can be obtained only through recognition.

It is strictly true that the great bulk of rights and duties between States are the result of active international relations. But there are also rights that may exist without such relations. Jellinek conceives of recognition as having two objects: to create an isolated personality of the State, and to create the State as a member of the community of nations. As an isolated subject of international law, he argues, the State can claim the rights of abstention, whereas, as a member of the international community, it enjoys the privileges of sending and receiving envoys, the conclusion of treaties, and the like.<sup>16</sup>

It is believed that, even in the absence of diplomatic relations, certain minimum rights can nevertheless be claimed and exercised by a State, for instance, the rights of independence and territorial integrity.<sup>17</sup> To argue otherwise would be to maintain that an unrecognised State may be invaded and subjugated without violation of international law. Although it is true that under traditional international law even an established State may be liable to invasion by another after the formality of a declaration of war,<sup>18</sup> yet it is doubtful whether it is correct to say that the unrestricted right of war is the same thing as the unrestricted right of invasion.

There is another group of rights which do not result from international relations, namely, the rights under the laws and customs

<sup>16</sup> This view is discussed and rejected by Le Normand, *op. cit.*, p. 81.

<sup>17</sup> [See Bogotá Charter, 1948, Article 6, *loc. cit.*, n. 14 above.]

<sup>18</sup> Lauterpacht, p. 4.

of war.<sup>19</sup> It has been pointed out by writers on international law that, should an unrecognised community become engaged in war, the laws of war will be followed as in any international war.<sup>19</sup> Likewise, should an unrecognised community remain neutral in an international war, its neutrality is to be equally respected by the belligerents.<sup>20</sup> If such are the rights and duties of an unrecognised community, it is difficult to argue that it has no personality in international law.

Furthermore, if an unrecognised State has emerged as the result of a civil war during which it enjoyed all the rights of the law of war, it is somewhat perplexing to find that, having achieved victory and established itself as a State, it should suddenly be deprived of personality. While, as a belligerent community, it was entitled to set up prize courts and their decisions were entitled to universal respect, why, upon attaining statehood, should the decisions of its courts cease to inspire the same respect which had been accorded to them at a time when the probability of its permanence was still in the balance?

It has been argued that in the absence of international relations, an international right, lacking means of enforcement, is abstract, like a ghost elusive to the grasp.<sup>21</sup> In reply, it may be said that every system of law admits of certain types of rights not immediately enforceable. These may be 'imperfect rights', but they are none the less legal rights.<sup>22</sup> The lack of international relations renders the enforcement of rights difficult, but not impossible<sup>23</sup>; it suspends the enforcement of rights, but does not destroy them. The inconvenience which such a state of affairs may create may be considerably reduced by the doctrine of the retroactive effect of recognition.<sup>24</sup> The proposition that the lack of means for enforcing international rights does not constitute an impediment to the acquisition of State personality finds further proof in the analogous cases of the severance of diplomatic

<sup>19</sup> Lauterpacht, p. 53; Cavaré, *loc. cit.*, p. 49.

<sup>20</sup> Brierly, *Règles Générales du Droit de la Paix*, 58, *Hague Recueil*, p. 54.

<sup>21</sup> Holmes, J., *The Western Maid* (1922), 257 U.S. 419, 433. See similar views, above, p. 5.

<sup>22</sup> Salmond, *op. cit.*, 10th ed., pp. 248-9.

<sup>23</sup> Measures of retorsion, reprisals and war are always open to the unrecognised State. The newly formed kingdom of Italy in 1861 compelled recognition by withdrawing the exequaturs of German consuls (Moore, *Digest*, vol. 1, p. 72).

<sup>24</sup> See below, p. 172 ff.

relations and the non-recognition of the new government of an old State. Here, too, international relations are broken off, international rights are no longer enforceable, and no normal way is open for the creation of subjective rights. But it has never been suggested that States which have severed diplomatic relations with some other States or which have governments unrecognised by some other States are not persons of international law. It seems, therefore, that the lack of means of enforcing subjective rights does not warrant the conclusion that a State has no personality.)

The second assumption that the international community is in the nature of a closed club with restricted membership, to which admission is granted through the process of recognition, is equally mischievous. The historical fact that international law originated among the States of Europe has made this notion of a 'closed club' a constant feature in the theories of international law. Thus, basing his argument upon this notion, Lorimer speaks of the three concentric zones or spheres of recognition,<sup>25</sup> and some writers contend that recognition is not necessary for European States.<sup>26</sup> Two questions suggest themselves. Is it true that international law contains principles that are *exclusively* peculiar to European civilisation? Is it possible at the present day to confine the application of such principles to a limited section of human society?

It cannot be denied that, as a matter of history, the formulation, theorisation and systematisation of the international legal system are the products of Europe. Yet, to conclude, without exhaustive research, that such principles as obtain in modern international law did not have parallel developments among non-European countries,<sup>27</sup> or that in the course of their development they have been entirely unaffected by any non-European influences, is to assume an attitude which can hardly be called scientific. If we recognise the natural necessity of co-existence

<sup>25</sup> Lorimer, *op. cit.*, note 19, p. 15 above, vol. I, pp. 101-2.

<sup>26</sup> Lawrence, *op. cit.*, note 5, p. 14 above, p. 82. Strisower thinks that recognition between States of European civilisation is merely a manifestation of the wish to enter into relations (Le Normand, *op. cit.*, p. 16). See distinction between the recognition of States within and outside the international community, the latter being constitutive (note 13, p. 32 above. Also Verdross, note 30, p. 16 above).

<sup>27</sup> See, for example, the discussion on international law concepts in Ancient China, Chen, *The Equality of States in Ancient China*, 35 A.J.I.L., 1941, p. 641, esp. literature cited at p. 642, n. 5.

and intercourse and the common feeling of humanity and brotherhood of men as the fundamental forces behind international law, is it not correct to say that the underlying principles of this system are the reflection of human proclivities generally, rather than a peculiar characteristic of any particular section of mankind? <sup>28</sup>

Even if it be conceded that there was once a period in which international law was the law peculiar to the European community of nations, we are positive that today it operates in nothing less than the whole of human society. Sir John Fischer Williams, while admitting that the assertion of constitutivism in regard to the recognition of States outside European civilisation is 'less absurd', dismisses it as of historical interest only. He says:

'Indeed, the conception of "civilised society" as a community of nations or States distinct from the rest of the world no longer corresponds with the main facts of contemporary life. . . . In the contemporary world it is no longer possible to maintain a view of human society in which some States would constitute a sort of exclusive club, to which election is made by a committee of the more prominent members under rather vague rules, more or less of unanimity, while the rest of humanity is left beyond the pale under the general protection of principles of morality but excluded from the reign of law. With this change of circumstances "recognition" as a fact creative for a State of international personality has lost whatever meaning it may once have possessed; civilised men organised in a definite territory under a sovereign government do not need to beg admission to international society; their State has *ipso facto*, by virtue of its mere existence, rights and duties, and, therefore, personality in the domain of International Law.' <sup>29</sup>

In the modern world, practically every human society has either formed itself into an independent State as a member of the society of nations, or constitutes part of one. Any new entity that may emerge in future must necessarily be the result of a reorganisation of existing States. If that is so, it would be un-

<sup>28</sup> Turkey had been maintaining relations with other States long before her admission into the Concert of Europe in 1856. The same is true of China (Smith, vol. I, pp. 16-8).

For the view that international law is applied to the whole of humanity, see Victoria (Scott, *The Spanish Origin of International Law*, Francisco de Vitoria and his Law of Nations, 1934, pp. 146, 158) and Bluntschli, *op. cit.*, note 10, p. 14 above, ss. 2, 7.

<sup>29</sup> *Recognition*, 15 *Grotius Transactions*, 1929, p. 53, at p. 60.

thinkable that a portion of humanity once under the protection of international law should, merely because it had reorganised itself into a new State, suddenly be deprived of that protection.<sup>30</sup>

The international community of today is co-extensive with human society.<sup>31</sup> Apart from that community, there can be no State existence. This can be demonstrated by the fact that it cannot be imagined that a State can voluntarily withdraw or be expelled from the international community. Mr. Elihu Root has aptly said that no nation need consider whether or not it will be a member of the community of nations. 'It cannot help itself. It may be a good member or a bad member, but it is a member by reason of the simple fact of neighbourhood, life and intercourse.'<sup>32</sup> So long as a State remains a State, it must be subject to international law. Neither itself nor any other State can alter the situation.

[The idea that there exists an exclusive international community from which politically organised societies of men, States though they are, may be barred from admission, is deceptive. A State is either a member of the international community or not a State at all. It would be absurd to imagine a 'State', in the true sense of the word, which stands outside that community, awaiting admission or having been excluded therefrom.<sup>33</sup>]

[The impossibility of detaching a State from the international community may also be viewed from a more practical aspect. The non-recognition of a State does not and cannot suspend all intercourse between individuals across the border.] Economic and social activities must be continued.<sup>34</sup> Such activities and

<sup>30</sup> *Loc. cit.*, n. 29, p. 36 above, p. 56.

<sup>31</sup> [The terms 'community' and 'society' have not here been used in their technical sociological sense. See Schwarzenberger, *International Law and Society*, 1 *Year Book of World Affairs*, 1947, p. 159, *The Study of International Relations*, 3 *ibid.*, 1949, p. 1 at pp. 12-3. Cf. also Individual Opinion of Judge Alvarez in *Membership in the United Nations* (1948), I.C.J. Reports, 1947-1948, p. 68 *et seq.*]

<sup>32</sup> Root, *A Request for the Success of Popular Diplomacy*, 13 *Foreign Affairs*, 1937, p. 405, at p. 410. Also Bluntschli, *op. cit.*, ss. 2, 7. [Cx., however, Schwarzenberger, *International Law and Totalitarian Lawlessness*, 1943, for the suggestion that a State may withdraw or be expelled from international society, chapter 4, 'The Totalitarian States as the International Outlaws', especially pp. 107-10.]

<sup>33</sup> Erich, *loc. cit.*, p. 465; Goebel, *op. cit.*, note 21, p. 15 above, p. 60. [Cx., however, Advisory Opinion of International Court of Justice on *Membership in the United Nations* (1948), I.C.J. Reports, 1947-1948, p. 57, especially individual opinion of Alvarez, p. 68.]

<sup>34</sup> [Cf. recommendations of the Advisory Committee of the League Assembly in connexion with 'Manchukuo', L.O.N. Off. J., 1934, pp. 17, 429. See, also, Hackworth, vol. 1, p. 332 *et seq.*]



intercourse inevitably give rise to legal questions which cannot be ignored. To deny that an unrecognised State exists in law is to create a legal vacuum within the borders of that State. It works both ways. Not only the nationals of the unrecognised State would be deprived of protection under international law; the nationals of existing States who may come within the jurisdiction of the unrecognised State would also find themselves in a legal no-man's-land. This latter consideration seems to have been an important factor in determining the recognition policy of Mr. Canning towards the Spanish-American Colonies. The choice was either to hold Spain responsible for acts of the Colonies, over which she had lost all control, or to lay that responsibility on the Colonies themselves. Canning eventually decided on the latter.<sup>35</sup>

It may be observed, however, that the likelihood of maltreatment of the nationals of the unrecognised State at the hands of existing States is not so much a direct consequence of non-recognition as a result of the mistaken belief that such iniquities can be inflicted with impunity. It is the constitutive view of recognition which creates and keeps alive such a belief. If States are aware that, despite non-recognition, a new State is nevertheless subject to international law, and is able to exact compliance with that law by retaliation or otherwise, the danger of improper treatment would not be so great.

Our discussion thus far points unmistakably to the conclusion that a State, if it exists in fact, must exist in law. There is no middle ground between a State and a member of the international community. (A State may exist without positive relations with other States; but it is not without rights or without means of exercising them, although the enforcement of such rights may be highly inconvenient and unsatisfactory.<sup>36</sup>) The domain of the

<sup>35</sup> Canning to Chevalier de Los Rios, March 25, 1825, 12 B.F.S.P. 1824-5, pp. 912-3.

<sup>36</sup> The Montevideo Convention on Rights and Duties of States, December, 1933, provides:

Article 3. Even before recognition, the State has the right to defend its integrity and independence. . . .

The exercise of these rights has no other limit than the exercise of the rights of other States according to international law.

Article 4. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the single fact of its existence as a person under international law, 28 A.J.I.L., 1934, Supplement, p. 75.

international community has today extended over the whole of the inhabited world, and is all-pervading and all-inclusive. A State emerging within this domain is inevitably, *ipso facto*, one of its members.

## § 2. THE MECHANISM OF RECOGNITION

Granting, for the sake of argument, that recognition is necessary for the creation of the international personality of the State, it still remains for the adherents of the constitutive theory to give a coherent and logical explanation of [the working mechanism of recognition.] Here, several difficulties will have to be encountered.

[If the international personality of the State depends upon recognition, how did the first State acquire its personality? As in the case of positivism, some sort of 'initial hypothesis' will have to be devised.] Lawrence, for example, maintains that the States of Europe, among whom international law had originated, need not be recognised.<sup>37</sup> Liszt thinks that the co-existence of a plurality of States is the condition necessary for the birth of international law.<sup>38</sup>

'The first State in human history', writes Sir John Fischer Williams, 'whether it was Egypt or Mesopotamia or China, must have arisen of its own strength in a world in which there was nobody—no other States, that is—qualified to recognise it.'<sup>39</sup>

Evidently, there must be some States, at least, whose international personalities are not derived from recognition.

Another vulnerable point in the constitutive view, to which declaratory writers have not hesitated to lay siege, is the circumstance that, [since recognition is accorded by States individually, and simultaneous action cannot be reasonably expected, the international personality thus recognised must, until universality of recognition is achieved, necessarily be partial and relative. The result would be that a State is a member of the international community for one State, but not for another.<sup>40</sup> There would be a period during which 'it enjoys at one and the same time the privileges of existence and non-existence'.<sup>41</sup>] If recognition is of

<sup>37</sup> Lawrence, *op. cit.*, p. 82; also, impliedly, Oppenheim, vol. I, p. 121.

<sup>38</sup> Liszt, *op. cit.*, p. 16.

<sup>39</sup> *Aspects of Modern International Law*, 1939, p. 26.

<sup>40</sup> *Ibid.*, p. 27; Brierly, *loc. cit.*, note 20, p. 34 above, p. 53.

<sup>41</sup> Williams, *op. cit.*, p. 27.

such decisive importance to the existence of a State, as constitutivist writers assert it to be, such a state of confusion must be extremely embarrassing.

Constitutive writers are compelled by their own logic to accept this unavoidable consequence of their theory. Le Normand explains that since personality consists of subjective rights, which vary from man to man, recognition as a subject of the law must necessarily be relative.<sup>42</sup> The relativity of recognition is also accepted by Oppenheim,<sup>43</sup> Lorimer,<sup>44</sup> Gemma<sup>45</sup> and Professor Kelsen. The last-named writer emphatically declares that 'there is no such thing as absolute existence'.<sup>46</sup> His relativism is carried so far that he even maintains that a State, having proclaimed itself to be such, 'becomes a subject of international law for itself and not in relation to others'.<sup>47</sup>

(While it is not disputed that relations between States may differ from case to case, nevertheless, to say that the very existence of a State is a relative matter is confessedly beyond comprehension.) Baty justly criticises such an argument as a series of 'metaphysical puzzles'. 'Either a State exists, or it does not; the opinion of other people on the subject does not alter the fact.'<sup>48</sup>

(The anomaly is even more glaring if we speak of recognition in terms of admission into the international community. How can we say that a State is a member of that community to one member, but not to another? Membership is the relation of the member to the society, and not to its individual members.<sup>48a</sup> The question is: at a given time is or is not a particular State a member of the international community?) It cannot be answered by a non-committal 'Both yes and no'.

(Professor Lauterpacht frankly admits the weakness of the constitutive theory on this point. His defences are: first, that

<sup>42</sup> Le Normand, *op. cit.*, pp. 24, 25, 81.

<sup>43</sup> Oppenheim, vol. I, 5th ed., p. 121.

<sup>44</sup> Lorimer, *op. cit.*, vol. I, p. 106.

<sup>45</sup> Gemma, *Les Gouvernements de Fait*, 4 *Hague Recueil*, 1924, p. 297, at p. 333.

<sup>46</sup> Kelsen, *loc. cit.*, note 8, p. 14 above, pp. 608-9.

<sup>47</sup> *Ibid.*, p. 609.

<sup>48</sup> Baty, *op. cit.*, note 21, p. 15 above, p. 205.

<sup>48a</sup> [This point was emphasised by the Secretary-General of the United Nations in his Memorandum concerning the representation of China in the United Nations at a time when its effective Government was recognised by only a minority of the Members, United Nations Press Release, PM/1704, March 8, 1950.]

it is the imperfection of the international organisation which is the cause of the divergent timing of recognition; secondly, that the difficulty of attaining uniformity in the appreciation of State existence is common to both the constitutive and the declaratory theories.] These defects, he argues, are not peculiar or inherent in the constitutive theory; the likelihood of divergent findings can be expected to be reduced by proper emphasis on the legal nature of recognition.<sup>49</sup> It may be agreed that the absence of a central international authority in the international community is a common source of grievance to both theories. But in the present condition of the international community, the declaratory theory has the decided merit of not falling into the absurdity of conceiving a State as existent and non-existent at the same time. Theoretically, at least, a State commences its objective existence from an objectively ascertainable time. States may be quick or slow in realising this existence, but they need not deny that the new State may have existed before they have accorded it recognition. The divergency of their findings does not affect the personality of that State.

[From the assertion of the constitutive school that recognition is relative, it must follow that no State can claim that it exists in the absolute sense. As a result, recognition must necessarily be reciprocal, because, inasmuch as a new State is none the less a State, it cannot, according to the positivist view, be burdened with duties to which it has not consented.] These doctrines of relativity and reciprocity of recognition inevitably give rise to an inextricable maze of astounding absurdities. [Since no State has absolute existence, State A has no more right to call State B into life than has State B to call State A into life. Prior to recognition, they are each non-existent in the eyes of the other.<sup>50</sup>] How can State A claim that it is a member of the international community, and that, through its recognition, State B also becomes a member? [On what ground can State A claim that the law to which it is subject is *the* international law, to which State B would have to be subject after recognition? Supposing two States, neither of which is recognised by any third State, recognise each other,

<sup>49</sup> Lauterpacht, p. 58.

<sup>50</sup> In 1822, De Zea, the Agent of Colombia, offered to 'recognise' all other existing Governments in return for their recognition of Colombia (Smith, vol. I, p. 121).

can they both claim to be subjects of international law? <sup>51</sup> Since mutual recognition is, according to the constitutive theory, the sole formal criterion of international personality, it would follow that, though they are not States in relation to other States, they are nevertheless States in relation to each other. This would seem to make nonsense of the constitutive doctrine which so jealously holds recognition as the key to membership in the international community. It would, moreover, mean the denial of international law as a universal standard of conduct. [Since no State is a member of the international community in the absolute sense, there can be no real international community, because any State which has not recognised a particular State may deny that they both belong to the same community. Consequently, a State would be free to disregard international law in its relations with a body which it has not recognised as a State, although the rest of the world has so recognised it. On the other hand, as would follow from the constitutive theory, a State, which has 'recognised' a body as a 'State', must apply international law towards it, whether or not the latter conforms to the general notion of statehood.] In practice, this has not been the case. Great Britain has 'recognised' Johore <sup>52</sup> and Kelantan <sup>53</sup> as 'sovereign and independent States'; yet it does not seem that her relations with them are governed by international law.

[If, according to the constitutive theory, recognition creates the legal personality of the State, that personality can only come

<sup>51</sup> 'Recognition, in order to be definitely effective, must emanate from a government which is itself recognised' (Moore, *Digest*, vol. I, p. 73). Le Normand does not seem to exclude the possibility of unrecognised States recognising each other, although he believes it is rarely done (*op. cit.*, p. 280).

In 1920, the Soviet Government recognised the Baltic States, to which the Allied Powers took exception on the ground that the Soviet Government was itself not recognised (see the Colby Note, U.S. For. Rel. 1920, III, 463). 'Manchukuo' and General Franco recognised the Italian Empire over Ethiopia (15 *Bulletin of International News*, 1938, p. 437). 'Manchukuo' also recognised 'Slovakia', June, 1939 (23 A.J.I.L., 1939, p. 761). ['Manchukuo', 'Croatia', 'Burma', 'the Philippines', and 'Free China' all recognised the 'Provisional Government of Free India' in October, 1942 (Green, *The Indian National Army Trials*, 11 M.L.R., 1948, p. 47, at p. 48).]

<sup>52</sup> *Mighell v. Sultan of Johore* [1894], 1 Q.B. 149, 150; [cf., also, decision of Gordon-Smith, J., in the Singapore High Court concerning the status of Johore subsequent to the Malayan Union Order in Council, 1946, and the Federation of Malaya Order in Council, 1948, *Abubakar v. Sultan of Johore* (1949), 15 *Malayan Law Journal*, 1949, p. 187, sustained on appeal, 16 *ibid.*, 1950, p. 3].

<sup>53</sup> *Duff Development Co., Ltd. v. Government of Kelantan* [1924], A.C. 799. See below, pp. 251-3.

into existence *after* the consummation of the act of recognition. This point seems to have been overlooked by constitutive writers who regard recognition as a reciprocal act or an act in the nature of an agreement.<sup>54</sup> These writers fail to show how an entity having no juridical existence can perform a juridical act which presupposes its personality.<sup>55</sup> Professor Kelsen compares such a feat to the attempt of Baron Münchhausen to extricate himself with the aid of his pigtail from the morass into which he had fallen.<sup>56</sup> Upon his conversion to the constitutive view, Professor Kelsen took pains to avoid this error of which he is so acutely aware. First, he writes, the new State must proclaim itself a State and become a subject of international law for itself. Reciprocal recognition with other States can then take place.<sup>57</sup> But this complicated process does not seem to have succeeded in overcoming the difficulty which his theory seeks to avoid, because, even though the new State can create personality for itself, its personality *vis-à-vis* other States does not exist by virtue of the self-recognition. Its position with respect to these States would be exactly the same as if no self-recognition had taken place, and the subsequent reciprocal recognition would lead one into the same error of presupposing the existence of the new personality.

The alternative doctrine, which has been vigorously put forward by Professor Lauterpacht, is to regard recognition as a unilateral act of the recognising State.<sup>58</sup> To the objection that the unilateral conferment of personality is contrary to the principles of State autonomy and equality,<sup>58</sup> Professor Lauterpacht replies that those principles of autonomy and equality apply only in the relations between States already in existence. Recognition, according to him, does not leave any permanent stigma of sub-

<sup>54</sup> For instance, Le Normand, *op. cit.*, p. 32; Anzilotti, *op. cit.*, note 7, p. 14 above, vol. I, p. 161; Redflob, *loc. cit.*, note 9, p. 14 above, p. 432; Kelsen, *loc. cit.*, p. 609; Graham, *In Quest of a Law of Recognition*, 1933, p. 17.

<sup>55</sup> This criticism is raised by Kelsen, Kunz, Diena and Cavaglieri, cited in Lauterpacht, p. 40. This objection applies also to Verdross's theory that recognition is bilateral, though not necessarily reciprocal (Verdross, *loc. cit.*, p. 329). Anzilotti, however, retorts that the same difficulty would be encountered by conceiving recognition as a unilateral act, for existing States cannot likewise manifest a juridical will to a new State which is outside the juridical order (Anzilotti, *op. cit.*, vol. I, p. 162).

<sup>56</sup> Kelsen, note 21, p. 15 above, p. 269.

<sup>57</sup> Kelsen, *loc. cit.*, note 8, p. 14 above, p. 609.

<sup>58</sup> This point has been raised by Carnazza-Amari against constitutivism in general, cited in Le Normand, *op. cit.*, p. 41.

ordination on the new State, 'for recognition, once given, creates an obligation which like any other international obligation owes its continued binding force to international law and not to the will of the State concerned'.<sup>59</sup> As to a second objection that recognition, even as a unilateral act, in order to produce juridical effects, must have reference to an entity possessing legal existence, it is explained that an act of recognition is an act by which the international legal system, through the agency of the existing States, 'extends its orbit to cover a new component part of the international society'.<sup>60</sup>

(But the explanation still leaves unexplained how recognition by means of a treaty can be considered a unilateral act.) Professor Lauterpacht argues that recognition, though contained in a treaty, does not constitute the contractual content of the treaty; it is a unilateral act which is placed on record in the treaty. The Anglo-American Treaty of 1783<sup>61</sup> and the Portuguese-Brazilian Treaty of 1825<sup>62</sup> are put forward as examples.<sup>63</sup> It is doubtful, seeing that the unilateral act of recognition which creates the personality of one of the contracting parties and the contract proper are embodied in the same document, whether it is possible to say that the one takes place before the other. And it might also be asked whether the very fact of entering into negotiations has not already raised the presumption of the legal existence of the parties.<sup>64</sup> Suppose such a treaty, after signature, fails to secure ratification, would it be possible for one party to say that, the treaty being without effect, the personality of the other party must therefore be deemed to be non-existent?<sup>65</sup> It seems that the answer should

<sup>59</sup> Lauterpacht, p. 58.

<sup>60</sup> *Ibid.*, p. 57.

<sup>61</sup> 1 *Treaties*, p. 586.

<sup>62</sup> 12 B.F.S.P. (1824-5), p. 675.

<sup>63</sup> Lauterpacht, pp. 56-7.

<sup>64</sup> See below, pp. 194-6.

<sup>65</sup> See *Republic of China v. Merchants' Fire Assurance Corporation of New York*, 30 F. (2d) 278 (C.C.A. 9th, 1929) (or Hudson, p. 86). [During the hearing the Court received a telegram from the Secretary of State 'that the Minister Plenipotentiary and Envoy Extraordinary of the National Government of China has been officially received by this Government, so that the recognition of the former is now settled beyond question' (at p. 279). This did not affect the Court's finding that the treaty itself (Treaty of Commerce, 1928), although unratified, contained a 'clear recognition' (*ibid.*).] Although this was a case of the recognition of a government, the principle involved is the same. In a letter of December 31, 1824, to Bosanquet, Canning, however, said that a commercial treaty, when *ratified*, constitutes recognition (Smith, vol. I, p. 150).

be in the negative. The personality of the new State is presumed in the negotiation and the subsequent conclusion of the treaty. It does not depend upon any particular stipulation in the treaty, whether bilateral or unilateral. The eventual invalidity of the treaty does not affect the existence of the personality of the contracting parties.

This argument applies with even greater force in the case of a treaty which contains no express reference to recognition, the parties entering into contractual relations as if taking the personality of each other for granted. Can it be said that, in such a case, there is also a prior unilateral act of recognition before entering into contractual relations? The same considerations apply to other implied forms of recognition, such as the accrediting of diplomatic representatives,<sup>65a</sup> and the issue of exequaturs to the consuls of the new State.<sup>65b</sup> These cannot be done without assuming the existence of the other party. The reason, in fact the only reason, why recognition can be implied is that the act in question can, by necessary implication, presuppose the existence of the State.<sup>66</sup>

[The unilateral act theory is open to the further objection that it is irreconcilable with the doctrine of relativism, which is the inevitable outgrowth of the constitutive theory so long as recognition is performed by individual States. The unilateral act theory cannot function unless it is presumed that the recognising State is an international person *in the absolute sense*. Otherwise, being non-existent itself in the eyes of the unrecognised State, its investiture of personality will have no meaning.] The treaties mentioned

<sup>65a</sup> [In this connexion reference should be made to the acceptance by Great Britain of an Israeli Minister in 1949. It was then pointed out that this acceptance in no way altered the nature of the British *de facto* recognition of Israel, *The Times*, May 14, 1949.]

<sup>65b</sup> [It is doubtful, however, whether the acceptance by the United States in 1950 of a German consul-general constituted any recognition of the Federal Republic of Germany, United States Information Service, *Daily Wireless Bulletin*, No. 1203, February 11, 1950.]

<sup>66</sup> British recognition of the Latin American States took the form of the conclusion of commercial treaties with no special reference to recognition. In insisting on this form of recognition, Canning said that the designating of the plenipotentiary of the new State as a plenipotentiary of an independent State is as good as saying that 'His Majesty recognises'. He thought this mode of recognition 'was better calculated for the . . . dignity of the State to be recognised . . . because the assumed independence is therein admitted, not created' (Canning to Sir Charles Stuart, December 1, 1825, in Webster, *Britain and the Independence of Latin-America, 1812-1830*, 1938, vol. I, pp. 291-2). As to implied recognition in general, see below, p. 192 ff.



above provide only for the recognition of the United States and Brazil by Great Britain and Portugal, respectively, and not *vice versa*.<sup>67</sup> They prove, in fact, that recognition is unilateral; but they also prove that the existence of Great Britain and Portugal are objective and absolute. [A more recent example is to be found in the Treaty of General Relations between the United States and the Philippine Republic, 1946. This Treaty was signed by the two States 'animated by the desire . . . to provide for the recognition of the independence of the Republic of the Philippines as of July 4, 1946, and the relinquishment of American sovereignty over the area'. By Article I, 'the United States agrees to recognise, and does hereby recognise, the independence of the Republic of the Philippines as a separate self-governing nation'.<sup>68</sup> A complication was introduced, however, by Article 8, which provided for the entry into force of the Treaty only on the exchange of ratifications, and this did not take place until October 22, 1946.<sup>69</sup>]

[The unilateral act theory is also in conflict with positivism. Positivism requires that no State should be subject to any law without its consent. This consent would be impossible if a State becomes subject to international law only through the unilateral act of another.

The unilateral act theory, although incompatible with the constitutive theory, is, however, compatible with the declaratory theory. If the function of recognition is to affirm and to accept a certain state of facts, it cannot but be a unilateral act.] Thus, declaratory writers, such as Erich, Nys and Moore, all regard recognition as unilateral.<sup>70</sup>

### § 3. MODIFICATIONS OF THE CONSTITUTIVE THEORY

[The traditional formulation of the constitutive theory attributes to recognition three important characteristics, namely, creativeness, arbitrariness and relativity.] Recognition being creative, a State,

<sup>67</sup> See Article 1 of the Anglo-American Treaty, 1783 (1 *Treaties*, p. 587): 'His Britannic Majesty acknowledges the said United States . . . to be free sovereign and independent States; that he treats with them as such . . .'; Article 1 of the Portuguese-Brazilian Treaty of 1825 (12 B.F.S.P., 1846, p. 675).

<sup>68</sup> Dept. of State, *Treaties and Other International Acts Series*, 1946, No. 1568.

<sup>69</sup> [Briggs, *Recognition of States; Some Reflections on Doctrine and Practice*, 43 A.J.I.L., 1949, p. 113, at pp. 115-6.]

<sup>70</sup> Erich, *loc. cit.*, p. 457; Nys, *loc. cit.*, p. 295; Moore, *Digest*, vol. I, p. 73.

before recognising a new community, owes no duty to it whatsoever, not even the duty to accord recognition. It follows from this discretionary nature of recognition that recognition can only have effect as between the parties, for the simple reason that other States are similarly free to decide whether or not to recognise.<sup>70a</sup> The fantastic consequences and the logical absurdities to which these tenets of constitutivism give rise have led its supporters to doubt whether such a theory can be defended without serious modifications. Two modifications advanced by Professors Kelsen and Lauterpacht demand special attention.

In a recent article in the *American Journal of International Law*,<sup>71</sup> [Professor Kelsen] abandons his former declaratory view and declares himself in favour of the constitutive theory. The original and anomalous feature of his doctrine lies in distinguishing in recognition two distinct acts: one political and one legal.] ✓ The political act of recognition indicates the willingness of the recognising State to enter into formal relations with the State to be recognised. Such an act is discretionary and gives rise to no legal consequences. It presupposes the legal existence of the State to be recognised and is therefore declaratory in character. [The legal act of recognition, on the other hand, is the determination by the recognising State that in a given case a State in the sense of international law exists. It is 'the establishment of a fact; it is not the expression of a will. It is cognition rather than re-cognition'.<sup>72</sup>] But the determination of fact entails legal consequences. [Its effect is that the recognised community becomes in its relation with the recognising state itself a state, ✓ i.e., a subject of rights and obligations stipulated by general international law.]<sup>73</sup> Recognition is therefore constitutive and relative. 'Existing' States are empowered, but not obliged, to recognise when the conditions for recognition are satisfied, although they may not recognise if the conditions are not satisfied.]

Professor Kelsen intends, perhaps, to bring about a recon-

<sup>70a</sup> [See, for example, the statement made by the representative of the United States to the Security Council in connexion with the *de facto* recognition of Israel, Security Council *Official Records*, No. 68, 3rd Year, p. 16.]

<sup>71</sup> *Recognition in International Law, Theoretical Observations*, 35 A.J.I.L., 1941, p. 605.

<sup>72</sup> *Ibid.*, p. 608.

<sup>73</sup> *Ibid.*

ciliation between the constitutive and the declaratory views, as his dualist conception of a political and a legal act of recognition corresponds to the conceptions of recognition held by the two schools. But the fact is not lost upon even a casual reader that his real emphasis is upon the legal act alone. It is not clearly indicated how the two acts operate as distinct acts. It would seem that, as far as the existence of the legal personality is concerned, the legal act is all that matters. The traditional formulation of the constitutive theory, though with far less emphasis, seems also to imply the political aspect of recognition.<sup>74</sup> The mere emphasis of this aspect does not seem to have the desired effect of correcting the evils attending the traditional constitutive theory.

[As far as the legal act of recognition is concerned, Professor Kelsen's doctrine has little to differentiate it fundamentally from the traditional view.] Inasmuch as he insists that the recognising State should be free to determine not only the fact of the fulfilment of the conditions of statehood, but also the conditions themselves, he must be considered as inclining rather to the extremist side of the orthodox view. In criticising his theory, Professor Brown points out that the basic principle at stake is the abhorrence of the legal system for a legal vacuum. Legal relations, as recent experience indicates, must continue, even where there is no recognition.<sup>75</sup> Professor Borchard expresses doubts as to the existence of the distinction made by Professor Kelsen and whether it has any practical significance.<sup>76</sup> He takes exception, in particular, to Professor Kelsen's argument that plunder is theft only after a court has so pronounced. Here, it may be submitted, lies a fundamental difference between the constitutive and the declaratory conceptions. The forcible taking of property may or may not be robbery, upon which an ordinary citizen may, indeed, find it difficult to judge. But if the court decides that it is robbery, the court does not 'create' the illegality of the act. The act is robbery not from the moment when the court pronounces its judgment, but from the moment the act was committed. Like-

<sup>74</sup> Oppenheim, for example, says that, through recognition, a State 'acquires the capacity to enter into diplomatic relations and make treaties with the States which recognise it' (Oppenheim, vol. I, 5th ed., p. 121).

<sup>75</sup> *The Recognition of New Governments*, 36 A.J.I.L., 1942, p. 106.

<sup>76</sup> *Recognition and Non-Recognition*, *ibid.*, p. 108.

wise, if a court pronounces that a person has reached majority, it merely says that a certain length of time has passed from the moment of his birth. It is the fact of a prescribed passage of time which produces legal consequences, and not the ascertainment of it. The pronouncement of the court might conceivably be made many years after the date of majority, but the legal consequences of majority do not date from the pronouncement. By analogy, a State exists as an international person as soon as it has fulfilled the requirements of statehood. The fact that States cannot have the same faculty for appreciating the fact of the fulfilment of these requirements is no reason for denying that there is an objective point of time at which such fulfilment takes place. Third States may be unable or unwilling to acknowledge this fact, but they certainly cannot alter it to suit their ignorance, caprice or self-interest.

It may be interesting in this connexion to compare a distinction drawn by a declaratory writer, [Professor Cavaré,<sup>77</sup> who divides recognition into two stages: a sociological recognition and a political recognition.<sup>78</sup> The source of juridical capacity, he argues, lies in social necessity. When a body is socially organised as a State, it becomes legally so. Recognition is, therefore, declaratory and automatic.] On the other hand, [political recognition is a political *démarche* and is, therefore, discretionary. A difficulty which arises here, as well as in Professor Kelsen's theory, is: how can one kind of recognition take place without the other?] In practice, when a State says: 'I recognise you', it must have political consequences. The 'legal' or 'sociological' recognition follows as a matter of course. There cannot be a separate act of 'legal' or 'sociological' recognition. [To say that a State has received 'sociological' recognition, is to say that there has been no overt act of recognition, but merely the non-denial of the juridical consequence of a sociological fact. This is why juridical consequences can, nevertheless, flow from the existence of a State which has been refused recognition. Any reference to the 'act of recognition' must necessarily mean the

<sup>77</sup> Cavaré, *loc. cit.*, p. 69 *et seq.*

<sup>78</sup> The distinction between 'political' and 'judicial' recognition put forward by Professor Doukas is substantially the same as Cavaré's distinction (Doukas, *The Non-Recognition Law of the United States*, 35 Mich. L.R., 1937, p. 1071, at p. 1078).

political act, which is declaratory. The creation of rights and duties are effected by the operation of the law itself upon the basis of facts, not the work of any third State.

#### § 4. THE DUTY OF RECOGNITION

The theory advanced by Professor Lauterpacht is an endeavour to strengthen the constitutive view by ridding it of its most objectionable feature, namely, the arbitrary character of recognition.<sup>79</sup> The essence of this theory is best expressed in the words of its author:

‘To recognise a community as a State is to declare that it fulfils the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition.’ In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfil that function in their capacity as organs of international law. In thus acting they administer the law of nations. This legal rule signifies that in granting or withholding recognition States do not claim and are not entitled to serve exclusively the interests of their national policy and convenience regardless of the principles of international law in the matter.

‘Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognising State and the community so recognised, of international rights and duties associated with full statehood.’<sup>80</sup>

The evils of basing recognition upon political considerations are too well known to require emphasis. They occur in one of two forms: either the accordance of recognition where the conditions of statehood have not yet been satisfied, or the withholding of recognition where these conditions have been satisfied. The first, that is, premature recognition, though resorted to by States

<sup>79</sup> Lauterpacht, p. 62.

<sup>80</sup> *Ibid.*, p. 6. See also Bluntschli, *op. cit.*, ss. 35-6. [Professor Lauterpacht also contends that, provided certain conditions are fulfilled, there is a duty to recognise a government, ‘Recognition of Governments’, *The Times*, January 6, 1950. This article should be read together with Dr. Schwarzenberger’s letter in reply, *The Times*, January 9, 1950. Professor Lauterpacht’s article was intended to explain the British recognition of the Communist Government in China, but in the Canadian House of Commons it was quoted in support by the advocates and opponents of such recognition, March 3, 7, 1950 (90 *Canadian Hansard*, Nos. 12 and 14).]

on numerous occasions, has received the almost unanimous condemnation of international lawyers.<sup>81</sup> Inasmuch as the doctrine of premature recognition denies the absolute creative force of recognition, it must be considered as opposed to the constitutive theory.<sup>82</sup> As to the second point, that of retarded recognition, opinions are divided. These transcend the line dividing the constitutive and the declaratory schools, but the reasons for holding similar views by writers of opposing schools are, however, entirely different.

The attitude of the constitutive writers in denying the legal duty of recognition is easy to understand. Following the positivist principle, a State cannot permit duties to be thrust upon it as a result of the emergence of a new political community.<sup>83</sup> Moreover, since State personality does not exist prior to recognition, there is no one to whom a foreign State owes a duty of recognition.<sup>84</sup> However, where there exists a treaty obligation to grant recognition, as, for instance, the obligations under Articles 81 and 87 of the Treaty of Versailles, recognition becomes a duty, though the obligation is owed to existing States, not to the new community to be recognised.<sup>85</sup>

The reason for declaratory writers holding this view, as pointed out by Professor Lauterpacht, is that they regard recognition as a formality or the expression of the wish to enter into diplomatic relations.<sup>86</sup> There is certainly no duty under international law to enter into diplomatic relations. The Institute of International Law declares that recognition is a 'free act'. Then it goes on to say that 'The existence of a new State with all the

<sup>81</sup> Lauterpacht, pp. 94-5. Liszt, however, considers premature recognition not as an illegal act, but as an unfriendly act towards the parent State (Liszt, *op. cit.*, p. 54; also Anzilotti, *op. cit.*, vol. I, p. 169).

<sup>82</sup> See below, p. 54, n. 96. Constitutive writers generally rely upon the contention that foreign States owe a duty to the parent State not to give precipitate recognition (Lawrence, *op. cit.*, p. 85; Oppenheim, vol. I, 5th ed., p. 126, 7th ed., p. 124; Liszt, *op. cit.*, p. 54). Redslob admits that a premature recognition produces no creative effect (*loc. cit.*, n. 9, p. 14 above, p. 440).

<sup>83</sup> Lauterpacht, pp. 63-64.

<sup>84</sup> Le Normand, *op. cit.*, p. 55. Writers who deny the legal duty of recognition include: Liszt, *op. cit.*, p. 54; Anzilotti, *op. cit.*, vol. I, p. 165; Kelsen, *loc. cit.*, p. 610; Hatschek, *An Outline of International Law*, 1930, p. 109; Dana's *Wheaton*, s. 26, p. 34; Oppenheim, vol. I, 5th ed., p. 120 [(*cx.*, however, 7th ed., vol. I, pp. 122-123)]. Kelsen, however, points out that, as an exceptional case, where a new State accedes to a treaty open to limitless accession to which the recognising State is a party, recognition becomes a duty (*loc. cit.* p. 614).

<sup>85</sup> Oppenheim, vol. I, 5th ed., p. 120, n. 2.

<sup>86</sup> Lauterpacht, p. 62.

juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States'.<sup>87</sup>

{Arbitrariness of recognition becomes unjustifiable only when recognition is conceived as constitutive.} International law does not stipulate as legal duties the establishment of international relations between States or the expression of approbation and confidence by one State in the conduct of another. These are political in nature and cannot be compelled. {The political nature of recognition is, therefore, quite consistent with the declaratory theory.<sup>88</sup>}

What seems to be of greater difficulty to the declaratory theory is the advocacy by some of its supporters of the obligatory nature of recognition. Hyde, for example, writes: 'When a country has by any process attained the likeness of a State and proceeds to exercise the functions thereof, it is justified in demanding recognition.'<sup>89</sup> Sir John Fischer Williams, while denying the legal duty of recognition on the ground that there can be no legal claim for damages on account of non-recognition, makes what seems to be the contradictory remark that 'the Family of Nations is not a club where a blackball may be given without responsibility and may exclude for no sound general reason a candidate for membership'.<sup>90</sup> Hall also says that 'no state has a right to withhold recognition when it has been earned'.<sup>91</sup>

This apparent conflict with other declaratory writers calls for an explanation. {Although the act of recognition does not create the personality of the State, it is nevertheless of great importance. It opens the avenue for international relations between the new State and the recognising State, and dispels any doubt which the recognising State may have privately entertained as to the legal existence of the new State, thus lending certainty to the treatment it would accord to the new State and its national[s].} As the treatment of one State by another is regulated by international

<sup>87</sup> Article 1 of the Resolution of 1936, 30 A.J.I.L., 1936, Supplement, p. 185.

<sup>88</sup> Writers holding this view include: Brierly, *op. cit.*, note 17, p. 15 above, p. 124; Fauchille, *op. cit.*, vol. I, Pt. I, pp. 317-8; Rivier, *op. cit.*, note 23, p. 15 above, vol. I, p. 57; Nys, *loc. cit.*, p. 294; De Louter, *op. cit.*, note 27, p. 16 above, vol. I, p. 219; Fiore, *op. cit.*, Article 35.

<sup>89</sup> Hyde, vol. I, p. 148.

<sup>90</sup> *Some Thoughts on the Doctrine of Recognition in International Law*, 47 H.L.R., 1933/1934, p. 776, at p. 780.

<sup>91</sup> Hall, p. 103. Similarly, Scelle, *op. cit.*, note 20, p. 15 above, vol. I, p. 100; Lorimer, *op. cit.*, vol. I, p. 104; Borchard, *loc. cit.*, p. 110; Fiore, *op. cit.*, Article 56.

law, the new State is entitled to demand that such treatment be accorded to it. It is this treatment which it claims as of right, not the creation of its personality through recognition. If this treatment can be accorded without recognition, then recognition would not be a legal duty. In practice, States seldom accord such treatment to States which they do not recognise. For this reason, a demand for recognition is often made in lieu of the demand for proper treatment, for the latter implies the former.

Since recognition is the usual condition for treating a new State according to international law, to regard it as a duty must be considered as generally conducive to better understanding between States. But under the constitutive theory, the maintenance of this view is confronted with logical difficulties. One question naturally suggests itself: if recognition—in the constitutive sense—is a legal duty, to whom is that duty owed? It cannot be to the new State, since it has not yet begun to exist.<sup>92</sup> To the international community as a whole?<sup>93</sup> The international community cannot be deemed to be *entitled* to the right of having a new member recognised unless it or each of its members is *entitled to claim* from the recalcitrant State the performance of the duty of recognition. That claim cannot be made unless it can be established that, in point of fact and according to the notion prevailing in that society, the conditions of statehood are present. But if this fact can be established, the recognition by any particular State would become tautologous. For, by the very establishment of that fact, the possession of personality by the State would have also been established, and there would consequently be no longer any need for creative recognition by any particular State. In other words, the international community can only claim the duty of recognition of a new State from a member State when, in the mind of the international community, the new State-person is objectively in existence. But then, there is nothing left for the recognising State to 'create' by its recognition. If, on the other hand, the recognising State is faithful to its duty and accords recognition the moment a new State satisfies the require-

<sup>92</sup> Redslob, *loc. cit.*, p. 434. *Contra*, Lauterpacht, who argues that, if the conditions of statehood are present, 'although, prior to recognition, the community in question does not possess the ordinary rights of statehood, it is entitled to claim recognition'. This claim becomes enforceable after the State has been recognised (Lauterpacht, pp. 74-5, 191, 192).

<sup>93</sup> Lauterpacht argues that since a society cannot exist without members, the creation of new members is a duty of a member to the society (*ibid.*, pp. 74, 78).



ments of statehood, it would be very difficult to say whether the personality of the new State is due to the creative force of the recognition or to the creative force of the presence of the requirements of statehood. The declaratory writers might, with equal justice, claim that the recognition thus accorded is merely declaratory and not constitutive. Professor Lauterpacht is undoubtedly aware of the strength of this logic when he says 'for there is but one step—which is certainly not a revolutionary one—between maintaining that an act is merely declaratory of a fact of primary importance in the life of a nation and treating that act as one of legal duty'.<sup>94</sup>

### § 5. THE CONDITIONS FOR RECOGNITION

It is a matter of general agreement among international lawyers, including proponents of the constitutive doctrine, that recognition cannot be divorced from fact.<sup>95</sup> This principle manifests itself in two ways. First, recognition must not be granted where the material conditions of statehood are absent. Second, recognition ought to be granted once those conditions are present. [Premature recognition is void<sup>96</sup> and constitutes an act of intervention and international delinquency.<sup>97</sup>] This is common to both the constitutive and the declaratory schools. As to delayed recognition, the delay must not be such as to prejudice the rights of the new State under international law.<sup>98</sup>

What then is this condition of fact which States contemplating

<sup>94</sup> Lauterpacht, p. 2.

<sup>95</sup> 'Pourtant, la reconnaissance serait une simple constatation de l'existence de l'état' (Le Normand, *op. cit.*, p. 36). '... recognition is thus declaratory of an existing fact' (Lauterpacht, p. 6). Similarly, Liszt, *op. cit.*, p. 53; Kelsen, *loc. cit.*, p. 608; Williams, *Recognition*, 15 *Grotius Transactions*, 1929, p. 53, at p. 56; Baty, *op. cit.*, p. 204; Dana's *Wheaton*, p. 35, n. 15, p. 41, n. 16; Goebel, *op. cit.*, p. 48.

<sup>96</sup> '... mais en droit la reconnaissance prématurée n'en reste pas moins un geste vide...' (Erich, *loc. cit.*, p. 478). Similarly, Lauterpacht, pp. 94-5; Redslob, *loc. cit.*, p. 440.

<sup>97</sup> Lauterpacht, p. 95. The recognition of the United States by France is believed to constitute an intervention (Paxson, *The Independence of the South American Republics*, 1903, pp. 26, 32; Goebel, *op. cit.*, pp. 72-93). As to the recognition of Panama by the United States, see *ibid.*, pp. 213-7. See also, below, pp. 85-6.

<sup>98</sup> [Cf. in this connexion the case of the *Bergen Prizes* (1779), in which the United States claimed compensation from Denmark in respect of the latter's non-recognition of American belligerency in the War of Independence (Moore, *International Arbitrations*, vol. 5, p. 4572). Although this was a case of non-recognition of belligerency, Professor Lauterpacht suggests it is an 'instructive example' in relation to the non-recognition of States (Lauterpacht, p. 75).]

recognition are compelled to take into account? What are the material conditions which render recognition both permissible and obligatory? Some writers hold the extreme view that recognising States are free to determine those conditions for themselves.<sup>99</sup> This is clearly inadmissible, as it would render any formulation of the principle of recognition impossible. If recognition is to be based upon facts, it is necessary to state what these facts are. [As recognition is the recognition of State personality, the conditions for recognition must naturally be those essential requirements of statehood as are laid down by international law.] Writers differ as to the precise character of these requirements.<sup>1</sup> The conditions laid down by Oppenheim seem to be a fair expression of the more generally accepted view. [These are (a) a people, (b) a country, (c) a government and (d) a sovereign government.<sup>2</sup>]

*People.* To constitute a State, there must be an aggregate of individuals living together in a community. It does not matter whether they are of the same race, colour or creed. A community is not prevented from becoming a State because it includes a minority population.<sup>3</sup> The suggestion that recognition should be based upon the principle of nationality<sup>4</sup> is inadmissible. As the State is but one of many institutions for the attainment of defined objects, it is impossible for it to coincide with all the divisions representing various kinds of human interests. This is not to minimise the strength of national sentiment nor the importance of the principle of national self-determination. But heterogeneity of population alone does not of itself constitute an impediment to statehood.

<sup>99</sup> Le Normand quite logically maintains that, since recognition is not obligatory, there is no need to state the conditions for recognition. He, nevertheless, lays down as the minimum condition: that a State must '*se present comme sujet de droit*' (*op. cit.*, pp. 60-1). Likewise, Kelsen maintains that, theoretically, States are free to determine the conditions of statehood, but rules have been developed laying down these conditions (*loc. cit.*, p. 610). Lorimer, while not expressing approval, seems to consider this as the prevailing practice (*op. cit.*, vol. I, p. 107).

<sup>1</sup> See differing enumerations by the following writers: Hall, p. 18; Fauchille, *op. cit.*, vol. I., Pt. I, p. 224; Erich, *loc. cit.*, pp. 474-6; Lauterpacht, pp. 26-30; Lorimer, *op. cit.*, vol. I, p. 109 *et seq.*; Brierly, *loc. cit.*, note 20, p. 15 above, p. 50; Scelle, *op. cit.*, note 19, p. 15 above, vol. I, pp. 74-6. See also the Montevideo Convention, 1933, Article 1 (*loc. cit.*, p. 75).

<sup>2</sup> Oppenheim, vol. I, p. 114.

<sup>3</sup> Fauchille, *op. cit.*, vol. I, Pt. I, pp. 223-4.

<sup>4</sup> For example, Pradière-Fodéré and Carnazza-Amari cited in Le Normand, *op. cit.*, pp. 261-3.

*Country.* The people must be settled in a defined territory. A wandering tribe does not constitute a State.<sup>5</sup> It is, however, not necessary that the frontiers of a new State should be definitely delimited before it can acquire statehood. Most of the new States which arose after the First World War were recognised before their frontiers were finally settled.<sup>6</sup> [Similarly, after the General Assembly of the United Nations resolved, on November 29, 1947, to partition Palestine,<sup>7</sup> and within one year of the termination of the Mandate in May, 1948, the State of Israel had been admitted to the United Nations and recognised either *de facto* or *de jure* by more than forty States, despite the non-demarcation of its frontiers.<sup>8</sup>] The promise of a new State to accept the frontiers later to be determined in a particular manner is only a form of conditional recognition, and has no effect upon the existence of that State.<sup>9</sup> The possession of territory is of such fundamental importance for the constitution of a State that it is suggested by some writers that a change of territory constitutes a change in the essence of that State.<sup>10</sup> Some changes may be so drastic, as in the case of a dismemberment, that it is doubtful whether any of the divided parts should be considered as the continuation of the original State. Baty, for example, argues that the Soviet Union or the Austrian Republic should not be considered the same States as the Russian or the Austro-Hungarian Empires, any more than should the Baltic States or

<sup>5</sup> Oppenheim, vol. I, p. 114.

<sup>6</sup> See the decision of German-Polish M.A.T. in *Deutsche Continental Gas-Gesellschaft v. Polish State* (9 M.A.T. (1929-1930), p. 336, at pp. 343-346, or *Annual Digest*, 1929-1930, Case No. 5, p. 15). In February, 1919, the United States hesitated to recognise the Czechoslovak Republic on the ground that the latter had no definite frontiers (Hackworth, vol. I, p. 208). But the recognition took place on June 2, 1919 (*ibid.*), before the actual determination of the frontiers by the Peace Treaties (the Treaty of Versailles was signed on June 28, and the Treaty of St. Germain on September 10 of that year). However, the reason for the refusal of the Allied Powers to recognise Lithuania was that, pending the Vilna dispute, her frontiers were not yet settled (Graham, *The Diplomatic Recognition of the Border States*, 1935, pp. 290, 444).

<sup>7</sup> [Resolution 181 (2), U.N. Doc./A.519.]

<sup>8</sup> [The United States recognised Israel *de facto* on May 14, 1948 (U.S. Information Service, *Daily Wireless Bulletin*, No. 683), and *de jure* on January 29, 1949 (Dept. of State *Wireless Bulletin*, No. 25). Great Britain afforded *de facto* recognition on January 29, 1949 (Foreign Office *Press Release*, January 29, 1949). With regard to Israel's admission to the United Nations, see Green, *Membership in the United Nations*, 2 *Current Legal Problems*, 1949, p. 258, at p. 274.]

<sup>9</sup> See below, p. 266, n. 10.

<sup>10</sup> Fricker even thinks that, by the cession of Alsace Lorraine to Germany, the French have formed a new State (Le Normand, *op. cit.*, p. 257).

Czechoslovakia.<sup>11</sup> However, there is a strong body of opinion in favour of the view that, so long as the territory of the old State has not been completely absorbed by the new State or by other States, it does not become extinct.<sup>12</sup> [Thus, in August, 1947, when the Empire of India was divided into the Dominions of India and Pakistan the United Nations regarded the new Dominion of India as continuing the personality of the Empire and remaining as an original member of the United Nations.<sup>12a</sup> Pakistan, on the other hand, was regarded as a new State, and had to apply for membership.<sup>12b</sup>] In cases like this, unless the territory of the old State is completely lost, it is probably necessary, in determining whether the State identity has been preserved, to take into consideration other factors, such as the retention of any particular section of the territory or population most intimately connected with the history of the State.<sup>13</sup>

*Government.* The people in a definite territory must have a government enjoying the habitual obedience of the bulk of the population. Only if a community is internally organised can it possess external personality in the international sphere. Canning considered the existence of an effective government as a necessary condition for the recognition of the Latin American States.<sup>14</sup> In 1875, the United States refused to recognise Cuba on the

<sup>11</sup> Baty, *op. cit.*, pp. 228-9; same, *Divisions of States; Its Effects on Obligations*, 9 *Grotius Transactions*, 1924, p. 119, at pp. 120-1. This contention also applies to the Ottoman Empire. Similarly, Hall, p. 22, n. 2. See below, p. 100.

<sup>12</sup> Oppenheim, vol. I, 5th ed., pp. 143, n. 1, 145; Moore, *Digest*, vol. I, p. 248; Brierly, *loc. cit.*, pp. 51-2. In *German Government v. Reparation Commission* (1924), a Special Arbitral Tribunal held that the Treaties of St. Germain and Trianon were based upon the theory that Austria and Hungary, parties thereto, represented the former Austro-Hungarian Monarchy (1 *Reports of International Arbitral Awards*, p. 429, at pp. 440-1). In *Billig v. Handelsvereenootschap onder de Firma S. Einhorn's Söhne* (1931), the District Court of Amsterdam held that the Austrian Republic was party to a convention signed by the Austrian Monarchy (*Annual Digest*, 1931-1932, Case No. 18). The same Court also held the Turkish Republic to be the same person as the Turkish Empire (*ibid.*, 1925-1926, Case No. 26). [Professor Borel, sole arbitrator, affirmed in the *Ottoman Debt Arbitration* (1925) that the Turkish Republic enjoyed the same international personality as the Ottoman Empire, 'en droit international, la République turque doit être considérée comme continuant la personnalité de l'Empire Ottoman', 1 *Reports of International Arbitral Awards*, p. 529, at p. 573.] The British official view regards Austria and Hungary as 'direct successors' of the Empire (McNair, *Law of Treaties*, 1938, p. 427). See also below, p. 100.

<sup>12a</sup> [Schachter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 25 *B.Y.I.L.*, 1948, p. 91, at pp. 94-5, 102-6.]

<sup>12b</sup> [Green, *loc. cit.*, p. 269.]

<sup>13</sup> Brierly, *loc. cit.*, pp. 51-2.

<sup>14</sup> Webster, *op. cit.*, n. 66, p. 45 above, vol. I, p. 435.

ground of the lack of organised government.<sup>15</sup> [In 1949, the United Kingdom extended *de facto*, and the United States *de jure*, recognition to the State of Israel after popular elections had been held in that country.<sup>16</sup>] In 1920, the Committee of Jurists of the League of Nations, which was consulted on the legal aspect of the Aaland Islands, was of opinion that, despite recognition by Soviet Russia and numerous other States, Finland was not, for want of a settled and orderly government, at the crucial date a State in contemplation of international law. It said in its report: 'these facts [*i.e.*, facts of recognition] do not suffice to prove that Finland, from this time onwards, became a sovereign State'.<sup>17</sup> In 1931 the Permanent Mandates Commission of the League suggested that the principal condition under which a territory under mandate can become independent is its possession of an effective government.<sup>18</sup>

*Sovereign government.* Sovereignty implies independence, independence not only of the parent State, but also of all other States. The sovereign State must possess a power, autonomous, undelegated, and distinct from all external powers.<sup>19</sup> According to this test, 'Manchukuo', although detached from China, was not independent, because of its subjection to the dominant control of Japan.<sup>20</sup> This equally applies to such creations as Slovakia and Croatia during the Second World War.<sup>21</sup> [In February, 1950, after the ratification by the French Assembly of a series of conventions signed by the Emperor Bao Dai and the French High Commissioner in Indo-China,<sup>21a</sup> Great Britain<sup>21b</sup> and the United States<sup>21c</sup> recognised Viet Nam, Laos and Cambodia as indepen-

<sup>15</sup> Moore, *Digest*, vol. I, p. 108.

<sup>16</sup> [Cf. note 8, p. 56 above.]

<sup>17</sup> L.o.N. Off. J., 1920, Sp. Suppl. Nos. 3, 8.

<sup>18</sup> L.o.N. Off. J., XII, 1931, p. 2176.

<sup>19</sup> Erich, *loc. cit.*, p. 434; *The Island of Palmas Case* (1928) between the United States and the Netherlands, decided by the Permanent Court of Arbitration (Scott, *Hague Court Reports*, 1916, p. 83, at p. 92). In *Duff Development Co., Ltd. v. Kelantan*, Lord Finlay said: 'It is not in the least necessary that for sovereignty there should be complete independence' ([1924] A.C. 797, 814). Here his lordship was speaking with reference to a dependency, and may not have been using the term 'sovereignty' with its full international law implications. See below, pp. 252-3.

<sup>20</sup> Below, p. 299, n. 47.

<sup>21</sup> Lauterpacht, p. 28.

<sup>21a</sup> [*The Times*, December 31, 1949.]

<sup>21b</sup> [*Ibid.*, February 8, 1950.]

<sup>21c</sup> [United States Information Service, *Daily Wireless Bulletin*, No. 1200, February 8, 1950.]

dent, associate States within the French Union. At the time of recognition it could not be said that these States had 'sovereign Governments' in the sense in which that term is used here. 'The conception of "independence within the French Union", . . . implies very wide powers of local autonomy guaranteed by the complete withdrawal of active control by France, but combined with considerable restrictions on the power of all three States to control their own relations with the outside world. . . . A qualified right to independent diplomatic representation in certain countries is . . . conceded.'<sup>21d</sup>]

(The acceptance of the conditions enumerated above must be subject to two qualifications: first, that they can only be stated in general terms; secondly, that they must be attended by a reasonable degree of permanence.)

As regards the first point, it is obviously impracticable, for instance, to prescribe any fixed standard of size and population. Lorimer suggests the criterion of 'the capacity for reciprocating recognition'.<sup>22</sup> This, however, does not seem to be of any practical value. In any concrete case we must fall back upon the prevailing notion of a State. Luxembourg and Liechtenstein exist<sup>23</sup> side by side with China and the Soviet Union. On the other hand, a band of pirates or outlaws cannot be considered as constituting a State.<sup>24</sup> The Vatican City is probably a marginal case, in which factors other than material size must have entered into consideration.<sup>25</sup>

As regards the second point, it is axiomatic that where a portion of a State attempts to separate itself from the whole, recognition must not be accorded while the war is still in progress. This principle is stated by Sir William Harcourt as follows:

'And a friendly State is bound to exact very conclusive and indisputable evidence that the sovereignty of a government with

<sup>21d</sup> [*The Times*, February 13, 1950.]

<sup>22</sup> Lorimer, *op. cit.*, vol. I, p. 133 *et seq.*

<sup>23</sup> Hackworth, vol. I, pp. 48-9. [In December, 1949, the General Assembly of the United Nations, acting on a recommendation of the Security Council, adopted a resolution in accordance with Article 93 of the Charter specifying the conditions on which Liechtenstein might become a party to the Statute of the International Court of Justice, 7 *United Nations Bulletin*, 1949, p. 723.]

<sup>24</sup> *Dana's Wheaton*, s. 17 (2).

<sup>25</sup> See below, p. 76.

which it has existing relations over any part of its former dominions has been *finally* and *permanently* divested.’<sup>26</sup>

The continuation of the struggle, as Le Normand rightly points out, is a bar to recognition, not merely because war is the protestation of the old State, but also because it is an obstacle to the actual existence of the new State.<sup>27</sup> The mere fact of the continuation of the war is conclusive evidence that the new State has not ripened into an independent existence, and there is therefore nothing to recognise. The reason given by the United States for not recognising the Baltic States in 1920 was that territorial changes should not be made while Russia was in the throes of civil war. This implies that, since a state of civil war can only be temporary, the element of permanence was lacking in the Baltic situation.<sup>28</sup> This principle also explains why a State does not become extinguished despite complete loss of territory during war. The existence of the war arrests the passage of time, so to speak, of the extinctive prescription.<sup>29</sup>

The introduction of extraneous requirements other than those stated above, such as the degree of civilisation, the legitimacy of origin, the religious creed and the political system of the new community, would shift the basis of recognition from the objective test of State existence to nebulous, intractable considerations. Lorimer’s doctrine that barbarous and savage peoples, peoples of certain religious beliefs, intolerant monarchies and republics, intolerant anarchies, communist or nihilist communities and communities under personal or class governments are not eligible for recognition on the ground that they are unable to possess a ‘reciprocating will’ seems to be contrary to both fact and principle.<sup>30</sup> Bluntschli positively maintains that violence of origin is no bar to recognition.<sup>31</sup>

<sup>26</sup> Harcourt, *Letters by Historicus*, 1863, pp. 7-8. Also, Fiore, *op. cit.*, Article 52; Le Normand, *op. cit.*, p. 250.

<sup>27</sup> Le Normand, *op. cit.*, p. 249. Also Hall, p. 108; Bluntschli, *op. cit.*, ss. 31, 34.

<sup>28</sup> Lauterpacht, p. 11. However, political motive is attributed by Laserson (*The Recognition of Latvia*, 37 A.J.I.L., 1943, p. 233, at pp. 241-2). Cf. also, Langer, *Seizure of Territory*, 1947, pp. 22-27.

<sup>29</sup> See below, pp. 63-4, 291.

<sup>30</sup> Hyde (vol. I, p. 147) and the International Commission of Jurists (Project II, Article 1, 22 A.J.I.L., 1928, Special Supplement, p. 240) include as a requirement of statehood a ‘degree of civilisation’. These views have been criticised as inexact and uncertain by Le Normand (*op. cit.*, p. 63), and are feared to lead to arbitrariness and extortion by Lauterpacht, p. 31. Strupp thinks that civilisation is not a term of international law (*Les Règles Générales du Droit de la Paix*, 47 *Hague Recueil*, p. 263, at p. 425).

<sup>31</sup> *Op. cit.*, s. 37.

[Another test of statehood which has been suggested and must be dismissed as inadmissible is the willingness of the new State to observe international law.<sup>32</sup>] Le Normand writes:

*'Pratiquement, puisque la personnalité de l'état n'existe pas avant la reconnaissance et qu'il n'a pas encore juridiquement vécu, il faut dire que la demande de reconnaissance fait par l'état nouveau implique l'adhésion a ces règles et, la reconnaissance accordée, l'obligation pour lui de les observer.'*<sup>33</sup>

This argument is not convincing. In the first place, if a State has no legal existence prior to recognition, logically it cannot express any will binding upon the future State-person. Secondly, even if such an obligation can be incurred, it is a simple promise, the breach of which is punishable, not because the State has consented to it, but because the State at the time of making the promise was already under a legal order which makes a breach of promise unlawful. Thirdly, [since no State can be outside the international society,<sup>34</sup> it has no choice not to submit to international law.<sup>35</sup>] The States created in 1919 had no choice whatever. Thus, Professor Brierly writes:

*'... ils [these States] se sont placés automatiquement sous le droit international, sans qu'on leur demandât ou qu'ils donnassent leur consentement, et je ne vois pas pourquoi nous lirons dans leur premier acte officiel une déclaration d'intention sur un point qui selon toute probabilité était absolument absent de leurs délibérations.'*<sup>36</sup>

[There seems to be no question that a new State will have to observe international law. If it refuses, it would be an ordinary case of law-breaking like a breach by any established State.] It

<sup>32</sup> Harcourt, *op. cit.*, p. 24; Lorimer, *La Doctrine de la Reconnaissance*, 16 R.I., 1884, p. 333, at pp. 339-41; Hall, p. 48; Hyde, vol. I, p. 17. Implied in Goebel, *op. cit.*, pp. 55, 61. This test is included in Article 1 of Project II of the International Commission of Jurists (22 A.J.I.L., 1928, Supplement, p. 240) and Article 1 of the Montevideo Convention, 1933 (28 A.J.I.L., 1936, Supplement, p. 75); also Report of Committee of Jurists of Council of League of Nations, L.o.N. Off. J. (1920), Special Supplement, No. 3, p. 18. See the application of this test in the recognition of governments, below, pp. 125-7.

<sup>33</sup> Le Normand, *op. cit.*, p. 239.

<sup>34</sup> See above, p. 36.

<sup>35</sup> Westlake, *op. cit.*, vol. I, p. 49; Bluntschli, *op. cit.*, s. 3. See also above, pp. 36-7.

<sup>36</sup> Brierly, *Le Fondement*, p. 19. Williams is, however, less unequivocal. He thinks that although a declaration by the new State of the acceptance of the law 'which already binds them' is not necessary, yet 'a refusal, expressed by declaration or by conduct, to accept that law would be another matter' (*Aspects of Modern International Law*, p. 28).



is not believed that an expression of the willingness to observe international law is necessary. Since, according to Le Normand, the application for recognition implies such an expression, then it can be taken for granted that such a willingness is expressed whenever a State presents itself for recognition.

The acceptance of a set of objective tests for the recognition of States is highly destructive to the constitutive theory. The opinion of the Committee of Jurists on the Finnish question<sup>37</sup> is remarkably instructive. It brings disillusionment to the belief that State personality can be created by the sheer will of other States, including even the parent State. It is the fact that a community satisfies the requirements of statehood, and not recognition, which constitutes the State personality.

#### § 6. CRITICISMS OF THE DECLARATORY THEORY

The declaratory theory may be summarised as follows: where a community satisfies certain requirements of statehood as laid down by international law, the law *ipso facto* attaches to it the legal quality of personality. Other States should take cognizance of this fact and treat the new State according to international law. The most conclusive demonstration of their willingness to treat it in this way may be given by means of recognition. The failure to act in accordance with the situation of fact would involve such consequences and inconvenience as the State injured—either the parent State or the new State, whichever it may be—may have power to inflict. Recognition is thus political in the sense that the recognising or non-recognising State is prepared to accept the risks and perils of its action or inaction. It is legal in the sense that to deny without good cause to a new State its right to be treated in accordance with international law would give just cause for complaint and would entitle the injured party to such remedies as may be permitted by international law.

Such a theory is open to strong criticism.

It has been objected to the proposition that every community upon fulfilling the requirements of statehood becomes automatically an international person, that the analogy is not found in municipal systems. It is pointed out that in systems of law which admit the institution of slavery, physical existence does not imply

<sup>37</sup> See above, p. 58, n. 17.

legal capacity. It is therefore argued that the mere physical existence of a State does not necessarily carry with it full legal personality.<sup>38</sup>

The truth is that there can be no 'physical existence' of a State independently of its 'legal existence'. A State, as such, exists only as a legal concept. All legal personalities, including individuals and corporations, are the creations of law. A human being has indeed a 'physical existence' apart from 'legal existence', but as a legal person he exists, in the eyes of the law, only in so far as he conforms to the requirements of the law. A slave, not conforming to these requirements, is not, legally speaking, considered as 'existing' at all. Likewise, a body of men not fulfilling the requirements of statehood, is not a 'State' in the true sense of the word. It may 'exist' as a group, a family, or a race, but never a State. It is therefore not contended, by those who support the declaratory theory, that it is the 'physical existence' of a State which calls for recognition. If a State exists at all, it must possess legal existence, which existence gives rise *ipso facto* to rights and obligations. This acquisition of personality is in no way different from the acquisition of personality under municipal systems of law.

[Since the existence of a State is dependent upon the fulfilment of the conditions stated above, how does one account for the continuance of the personalities of States which have been completely deprived of their territories, such as Belgium and Serbia during the War of 1914-1918, and Norway, Poland, Greece, Luxembourg, Yugoslavia and the Netherlands during the Second World War? Is it not solely upon the continued recognition of the Allied Powers that these States depend for their existence? The answer is that war creates a temporary state of things.] The occupation of the territory by the enemy does not confer title upon the occupant.<sup>39</sup> The occupied territory, although for the time being beyond the actual control of the legitimate sovereign, may still be considered as constructively under his sovereignty. The

<sup>38</sup> Lauterpacht, p. 45; Le Normand, *op. cit.*, pp. 19 *et seq.*

<sup>39</sup> [Cf. Baty, 'hostile occupation acts as a sterilising medium to preserve the *status quo*', *Canons of International Law*, 1930, p. 480. See also Borel, Arbitrator, in the *Ottoman Debt Arbitration*, 1925, 'Quels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté', 1 *Reports of International Arbitral Awards*, p. 529, at p. 555.]

personality of the State is therefore complete with all its constituent elements.<sup>40</sup>

This principle applies also to the case of Ethiopia, although this is a borderline case. The military operations were virtually terminated after the occupation of Addis Ababa by Italian forces on May 2, 1936, but, despite the Italian decree of annexation on May 9, Ethiopia's right of membership in the League of Nations and her right to be represented at League meetings were nevertheless conceded as late as May, 1938.<sup>41</sup> By that time, many States had recognised the Italian annexation,<sup>42</sup> but the Ethiopian delegate asserted at the Council Meeting that the Italian troops were not in complete control of Ethiopian territory. The British Delegate, Lord Halifax, agreed that resistance was still continuing in certain parts of the country.<sup>43</sup> It thus seems that the situation which would have justified regarding the Ethiopian State as extinct was not conclusively established. While this was so, the benefit of doubt should in fairness have been given to that State, the victim of aggression, especially

<sup>40</sup> Oppenheim, vol. II, p. 342; McNair, *Legal Effects of War*, 1948, p. 320; Brown, *Sovereignty in Exile*, 35 A.J.I.L., 1941, p. 666, at p. 667. This view is upheld in *Naoum v. The Government of the Colony of French West Africa*, French Court of Cassation (1919), *Annual Digest*, 1919-1922, Case No. 312; *Bolliotti v. Masse*, Italian Court of Rhodes (1920), *ibid.*, Case No. 318; *Commune of Bácsborod* Case, Hungary, Supreme Court (1922), *ibid.*, Case No. 316; *Czechoslovak Occupation (Hungary)* Case, Hungary, Supreme Court (1922), *ibid.*, Case No. 317; *Republic of Poland v. Siehen*, Supreme Court of Poland (1926), *ibid.*, 1925-1926, Case No. 10. In *Del Vecchio v. Connio* (1920), the Court of Appeal of Milan decided that the occupation of Trieste did not confer sovereignty upon Italy (*ibid.*, 1919-1922, Case No. 320). But the Court of Cassation at Rome held in *Galatioto v. Senes*, 1922, that the occupation of Trieste was the recovery of a lost province, and the sovereignty of Italy was automatically restored (*ibid.*, Case No. 319). [Similar judgments were delivered during the second World War, cf., for example, *Re Blak's Estate* (1944, District Court of Appeal, California), concerning the Netherlands (150 P. 2d 567); *Re Skewry's Estate* (1944, Surrogate's Court, Westchester County, New York), concerning Poland (46 N.Y.S. 2d 942); and *Bercholz v. Guaranty Trust Co. of New York* (1943, New York Supreme Court), concerning France (44 N.Y.S. 2d 148).] This principle is not believed to be applicable to a body of men claiming to have constituted a State but not yet having any territory. It is, however, claimed by Hobza that Czechoslovakia had become a State from the date of her recognition by France, though her territory was not acquired until some time later (Hobza, *La République Tchécoslovaque et le Droit International*, 29 R.G.D.P., 1922, p. 385, at p. 390). See also below, pp. 291, 296-7.

<sup>41</sup> Lauterpacht, p. 347; L.O.N. Off. J. (1938), pp. 335, 535; *League Documents, Members of the League and Composition of the Council*, September 21, 1938, p. 2.

<sup>42</sup> See statement of the British Under-Secretary of State in the House of Commons, May 11, 1938 (Parl. Deb., H.C., 5th ser., vol. 335, col. 1608). *De jure* recognition by Britain took place in November, 1938 (*Haile Selassie v. Cable and Wireless, Ltd.* (No. 2), [1939], Ch. 182). See also *Survey of International Affairs*, 1938, vol. I, pp. 144-52, 162, 163, 173.

<sup>43</sup> *Bulletin of International News*, vol. XV, pp. 435-7.

having regard to the international obligations of States, Members of the League regarding the prevention of aggression and guaranteeing respect for the territorial integrity of other States.<sup>44</sup> The revocation of the recognition of the Italian Empire by the former recognising States<sup>45</sup> seems to show that so long as military operations have not been terminated completely and the former government has not been finally and permanently deprived of all hopes of restoration, the occupation of the territory by the enemy cannot be considered as extinguishing the dispossessed State.<sup>46</sup> Despite recognition of the conquest by other States, the existence of the dispossessed State remains unaffected.

The question is more difficult in the cases of Czechoslovakia, Albania, Austria and Germany. In all of these, the conquest was complete, and for a time no government was in existence. Czechoslovakia and Albania have now been restored; Austria has been separated from Germany, but it is still under Allied control; and the reunification of Germany into a single State may be expected as soon as the peace treaty is signed, [although in 1949 a West German State came into existence,<sup>47</sup> to be followed almost at once by the establishment of an East German State]. It may be relevant to ask: did these States ever cease to exist? Is there a legal continuity between the old State and the new when established? If there is not, these States must be considered as new entities entirely broken away from the past. If there is, how can we explain the existence of a State in which one or more of the essential elements of statehood are absent? As these cases arose from the abnormal circumstances of war, the application of principle is bound to be more or less strained, and a more detailed explanation is called for.

<sup>44</sup> Covenant of the League of Nations, Article 10.

<sup>45</sup> For British withdrawal of recognition, see *Azazh Kebbede Tesema and Others v. Italian Government*, Palestine Supreme Court (1940) (7 Palestine L.R., p. 597), *Annual Digest*, 1938-1940. Case No. 36.

<sup>46</sup> Brown, *loc. cit.*, n. 40, above, p. 667; below, pp. 291, 296-7. The question of Ethiopia, as well as those of Czechoslovakia, Austria, Albania and the Baltic States, involves not simply the existence of States but also the question of the validity of illegal conquests. As long as international action is being taken to thwart the conqueror from consolidating his gains, the mere fact of the loss of territory does not *ipso facto* entail the extinction of the dispossessed State. For a study of this problem from the latter point of view, see Langer, *op. cit.*, note 28, above, pp. 123-285.

<sup>47</sup> [The Constitution of the West German Republic was signed on April 23, 1949 (*The Times*, April 24, 1949); *Basic Law for the Federal Republic of Germany*, 1949. See also Schmid, *The Work of Bonn*, 3 *World Affairs* (New Series), 1949, p. 358.]

Writers are not agreed how far the absence of a government affects the existence of the State.<sup>48</sup> In 1870 Bismarck refused to conclude peace with France on the ground that the French State had ceased to exist owing to the revolution.<sup>49</sup> But in the subsequent Treaty of Peace<sup>50</sup> the French Republic was compelled to accept the responsibility of the defeat and to cede territories and pay indemnities. Evidently, the legal continuity of the State person was taken for granted, in spite of the temporary anarchy.

This principle applies in the cases of the annexation in 1939 of Czechoslovakia by Germany and of Albania by Italy. In both cases the national governments were temporarily dissolved,<sup>51</sup> although in the Czechoslovak case the continuity of the State was carried on by the Czechoslovak National Committee.<sup>52</sup> The conquests were denounced as illegal by the principal Powers, who refused to accord them recognition.<sup>53</sup> The whole situation, followed closely by the outbreak of the European War in September, 1939, showed no promise of permanence.<sup>54</sup> The illegality of the original conquests, together with the suspensive effect of war, must be regarded as having sustained the continuity of the States despite the temporary absence of their governments.<sup>55</sup>

<sup>48</sup> Lorimer maintains that anarchy dissolves the State (*La Doctrine de la Reconnaissance*, 16 R.I., 1884, p. 333, at p. 346). Similarly, Bluntschli, s. 61. Fiore thinks that State personality may be temporarily split by civil war (*op. cit.*, Article 74, p. 98), *Contra*, Erich, *La Naissance et la Reconnaissance des Etats*, 13 *Hague Recueil*, 1926, p. 431, at p. 476. See below, p. 99.

<sup>49</sup> Baty, *So-called De Facto Recognition*, 31 *Yale L.J.*, 1921-1922, p. 470, at p. 472, n. 5.

<sup>50</sup> Preliminary Treaty of Peace, February 26, 1871, and Definitive Treaty of Peace, May 10, 1871 (Hertslet, *Map of Europe by Treaty*, 1885, vol. 3, pp. 1912, 1954).

<sup>51</sup> Czechoslovakia on March 15, 1939 (Oppenheimer, *Governments and Authorities in Exile*, 36 *A.J.I.L.*, 1942, p. 568, at p. 570), and Albania on April 16, 1939 (Langer, *op. cit.*, p. 246).

<sup>52</sup> Oppenheimer, *loc. cit.*, p. 571; Langer, *op. cit.*, p. 234. An Albanian Government was established in November, 1944, *ibid.*, p. 250.

<sup>53</sup> The annexation of Czechoslovakia was not recognised by the United States, France, or the Soviet Union (*ibid.*, pp. 221-2, 232), while the annexation of Albania was not recognised by the United States (*ibid.*, p. 246). *De facto* recognition was, however, accorded by Great Britain in both cases (*ibid.*, pp. 224, 229, 248), although *de jure* recognition was refused where Albania was concerned (see the statement of the Government in the House of Commons, May 1, 1939, *Parl. Deb.*, H.C., 5th Ser., vol. 346, col. 1484).

<sup>54</sup> For the view that the subjugation of a State cannot be definitive as long as other States continue to carry on the war, see below, p. 291, n. 16.

<sup>55</sup> The position of Czechoslovakia was considered as fundamentally similar to other exiled governments (Langer, *op. cit.*, p. 236). The United States regarded prior treaties with Albania as continuing in force (*ibid.*, pp. 252-3); [cf. also Security Council, *Official Records*, First Year, Second Series, Supplement No. 4, p. 58, and Green, *Membership in the United Nations*, 2 *Current Legal Problems*, 1949, p. 258, at p. 270].

In the cases of Austria and Germany, however, the circumstances were different. The absorption of Austria by Germany on March 13, 1938, took place with hardly any show of resistance.<sup>56</sup> From then until the German surrender, there was actually no Austrian Government in existence. No positive effort was made, either by the Austrians themselves or by foreign Powers, to constitute an effective challenge to the German action.<sup>57</sup> It is hardly possible to assert, in the face of these facts, that the Austrian State continued to exist without interruption.

The suggestion has, however, been made that the annexation, being contrary to Article 80 of the Treaty of Versailles, Article 88 of the Treaty of St. Germain and the Geneva Protocol of October 4, 1922, was null and void in law.<sup>58</sup> This view seems to have found support in the Declaration of Moscow issued by the British, American and Soviet Governments, November 1, 1943, which stated:

‘That Austria, the first country to fall a victim to Hitlerite aggression, shall be liberated from German domination. They regard the annexation imposed on Austria by Germany on March 15, 1938, as null and void. They consider themselves as in no way bound by any change effected in Austria since that date.’<sup>59</sup>

If this declaration means that the Austrian State had never ceased to exist, it should logically follow that, being a victim of

<sup>56</sup> Garner, *Questions of State Succession raised by the German Annexation of Austria*, 32 A.J.I.L., 1938, p. 421, at p. 422; Wright, *The Legality of the Annexation of Austria by Germany*, 38 A.J.I.L., 1944, p. 621, at p. 633.

<sup>57</sup> In March, 1938, Germany took over the Austrian Legation in Washington. On April 6, the Government of the United States announced the closing of its legation at Vienna (Hackworth, vol. I, p. 449). Similar steps were taken by the British Government (*Documents on International Affairs*, 1938, vol. II, p. 96; April 5, 1938, Parl. Deb., H.C., 5th ser., vol. 334, col. 194). The British Foreign Secretary stated on March 16, 1938, that the Government were ‘bound to recognise that the Austrian State has been abolished as a national entity’ (Parl. Deb., H.L., 5th ser., vol. 108, col. 180). The League of Nations also tacitly admitted Austria’s extinction (Langer, *op. cit.*, p. 164). See generally, Lauterpacht, pp. 397-400; Langer, *op. cit.*, Ch. XXII. The fact of annexation was admitted in American decisions: *Land Oberoesterreich v. Gude* (1940) 109 F. (2d) 635; *U.S. ex rel. Zdunic v. Uhl* (1941) 46 F. Supp. 688, (1942) 47 F. Supp. 520; see also a decision of the District Court of Zurich, 1939 (*Annual Digest*, 1941-1942, Case No. 23). A German anti-racial decree was, however, refused enforcement in an American court on the grounds both of non-recognition and of public policy (*Johnson v. Briggs, Inc.* (1939), 12 N.Y. Supp. (2d) 60). See also below, p. 69, n. 67.

<sup>58</sup> Wright, *loc. cit.*, pp. 621-2; below, pp. 430-1, 437.

<sup>59</sup> *United Nations Documents*, 1941-1945, 1946, p. 15.

aggression liberated from the domination of Germany, it should receive the same treatment as other liberated States of Europe. There could be no ground for imposing on it a military government. Its citizens should not be treated as enemies. It should be permitted to take part in the peace settlement as a victor, rather than as a vanquished State.<sup>60</sup>

But that has not been the case. On the contrary, Austria was reminded that 'she has a responsibility, which she cannot evade, for participation in the war at the side of Hitlerite Germany'.<sup>61</sup> The Allied Powers have consistently acted upon the premise that Austria was part of an enemy State<sup>62</sup> and its citizens alien enemies.<sup>63</sup> On its establishment on May 1, 1945, the Austrian Provisional Government issued a 'Proclamation of the Independence of Austria'.<sup>64</sup> The Allied Governments have on no occasion alluded to the continued existence of the Austrian State, although they expressed the desire to see the re-establishment of an independent Austria.<sup>65</sup> The League of Nations apparently also treated the pre-*Anschluss* Austria as extinct. When the Assembly of the League was convened in April, 1946, for liquidation, Austria was asked only to send observers, and not a regular delegation.<sup>66</sup>

<sup>60</sup> For a full discussion of the treatment of Austria, see Langer, *op. cit.*, pp. 155-206.

<sup>61</sup> *United Nations Documents, 1941-1945*, p. 15.

<sup>62</sup> See Mr. Eden's statement in the House of Commons, March 1, 1945, that Austria could not 'be placed on an equal footing with liberated territory or Allied territory' (Parl. Deb., H.C., 5th ser., vol. 408, col. 1665). The Supreme Allied Commander, upon the establishment of the Military Government in Austria, declared that 'The Allied Forces entered Austria as victors inasmuch as Austria has waged war as an integral part of Germany against the United Nations' (May 24, 1945, *Bulletin of International News*, vol. XXII, p. 521).

<sup>63</sup> Austrian prisoners of war were segregated in accordance with the Prisoners of War Convention of July 27, 1929, by the British authorities, but not by the American authorities (Langer, *op. cit.*, pp. 186-7). Some distinctions were made in the United States between Austrians and Germans for the purpose of exempting the former from the restrictions of alien enemies (*ibid.*, pp. 170-3), but the British Government continued to regard Austrians as alien enemies even after the German surrender (*ibid.*, pp. 174-81, 183-6). See the extreme case of *The King v. Home Secretary, ex parte L.* [1945], 1 K.B. 7, in which a former Austrian who became a German national in consequence of the annexation was regarded as an alien enemy despite his having been denationalised by a subsequent German decree. See comments in 23 B.Y.I.L., 1946, p. 378.

<sup>64</sup> Langer, *op. cit.*, p. 191.

<sup>65</sup> See the directive of the American Government regarding the Military Government in Austria, June 27, 1945 (*ibid.*, p. 194).

<sup>66</sup> L.O.N. Off. J. (1946), Document A. 22, 1946.

The above analysis indicates that, although the legal status of Austria has been, and still is, far from clear,<sup>67</sup> there is however sufficient evidence to show that she has not been treated as a liberated country like Czechoslovakia. If the Moscow Declaration is to be interpreted as meaning that Austria had never ceased to exist, we must come to the absurd conclusion that Austria had, in her separate existence, joined Germany in a partnership of aggression. On the other hand, it is also impossible to regard the revived Austria as an entirely new State. For it would render unjustifiable the imposition upon her of any responsibility for the War, in which, as a new State, she had never taken part.

What, then, can be the explanation of this enigma? Obviously, the theory of the continued existence of Austria throughout the period of German occupation cannot be maintained.<sup>68</sup> Austria could not have existed for eight years without a government. The Moscow Declaration, which declared that the annexation by Germany was 'null and void', only annulled the legal right of Germany over Austria, but did not necessarily revivify the Austrian State. This interpretation of the Moscow Declaration was clearly accepted by the American Government, who, in its directive of June 27, 1945, regarding Military Government in Austria, stated:

'The formal abrogation of the *Anschluss* (Act of March 13, 1938) will not be considered as re-establishing the legal and constitutional system of Austria as it existed prior to that event.'<sup>69</sup>

In view of the foregoing, it seems that the only possible explanation, though not entirely satisfactory due to the contradictory conduct of the Allied Governments, seems to be that the old Austria is extinct. The new Austria emerged into life

<sup>67</sup> The United States Circuit Court of Appeal in *U.S. ex rel. d'Esquiva v. Uhl* (1943), 137 F. (2d) 903, after having reviewed the contradictory acts and statements of the Executive Department, decided that further clarification from the State Department was necessary. The case, however, came to an inconclusive end, owing to the discontinuance of the proceedings by the District Attorney subsequent to the Moscow Declaration, November 1, 1943. See Langer, *op. cit.*, p. 171, n. 46.

<sup>68</sup> It is suggested by Langer (*op. cit.*, p. 183) that Austria may be regarded as a neutral State whose territory came under belligerent occupation. But there was no war between March, 1938, and September, 1939. This theory also fails to provide legal justification for the imposition of a military government after the German surrender, and is unable to explain the conduct of the Allied Powers mentioned above.

<sup>69</sup> *Ibid.*, p. 195.



as part-successor to the German *Reich* with a heritage of responsibilities which she had incurred as an integral part of Germany.<sup>70</sup>

The question of the legal position of Germany since the unconditional surrender in 1945 has been one of the most controversial topics among international lawyers and is likely to remain a legal mystery for some time, at least under the accepted concepts of international law. By the Declaration of Berlin, June 5, 1945, the Four Allied Powers—Great Britain, the United States, the Soviet Union and France—assumed ‘supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal, or local government or authority; the assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany’.<sup>71</sup> It was stated in the Declaration that ‘there is no central Government or Authority in Germany’, and that the Allies ‘will hereafter determine the boundaries of Germany . . . and the status of Germany’.<sup>72</sup> A more detailed Proclamation was issued on September 20, 1945.<sup>73</sup> Germany was divided up into Zones and a system of military governments was set up.<sup>74</sup> Laws and ordinances which fundamentally reshaped and modified the political and economic life of Germany were issued by the Zonal Military Commanders and the Control Council.<sup>75</sup> Under these circumstances, does Germany continue to exist as a State?

In a recent English case, *R. v. Bottrill, ex parte Kuechenmeister* (1947)<sup>76</sup> the question of Germany’s status was in point. A certificate of the Foreign Office, dated April 2, 1946, stated (a) that the assumption of authority in Germany by the Allies did not effect the annexation of Germany, (b) that Germany exists as a State and German nationality as a nationality, and (c) that the war continues to exist, as no treaty of peace or declaration

<sup>70</sup> See the British communication to Austria, September 16, 1947, terminating the state of war between the two countries (*London Gazette*, September 16, 1947, p. 4340).

<sup>71</sup> Cmd. 6648 (1945).

<sup>72</sup> *Ibid.*

<sup>73</sup> Proclamation No. 2, *Official Gazette of the Control Council for Germany*, 1945, pp. 8-19; 40 A.J.I.L., 1946, Supplement, p. 21.

<sup>74</sup> For the structure of the Military Government, see Friedmann, *Allied Military Government of Germany*, 1947, Ch. 4; Jennings, *Government in Commission*, 23 B.Y.I.L., 1946, pp. 112, 118. For a full discussion of the status of Germany, see Stödter, *Deutschlands Rechtslage*, 1948.

<sup>75</sup> Friedmann, *op. cit.*, Appendices.

<sup>76</sup> [1947] 1 K.B. 41.

by the Allied Powers has been made. In the Court of Appeal, Scott, L.J., felt obliged to accept the view of the Foreign Office as conclusive in English law, though he hinted that in international law the conclusion might have been different.<sup>77</sup> Courts of other countries have also given judgments to the same effect.<sup>78</sup>

The opinion of the British Government has, no doubt, great influence in creating and modifying rules of international law, especially if all great Powers accept the same view. But, in view of the actual state of affairs in Germany, whether the British proposition can be maintained in the light of the established principles of international law is quite another question. Writers who support the view that the State of Germany continues to exist are obliged to admit that the unique situation cannot be neatly fitted into orthodox legal categories.<sup>79</sup> In view of the fact that the Allied Powers are now exercising an authority far exceeding that permitted by the traditional laws of war,<sup>80</sup> these writers are compelled to maintain either that the war has been terminated,<sup>81</sup> or that it is continued under a changed conception of law.<sup>82</sup> But to argue that the war has been terminated would be to make the exercise of such authority by the Allied Powers even more unjustifiable. The only basis for the exercise of such authority must be the extinction of the German State.

The arguments in support of the British view seem to stress two points: that the Allies have expressly disclaimed the intention of annexation; and that Germany possesses a government in the form of the Control Council.

As to the first point, it may be said that the disclaimer of annexation has merely the negative effect of not incorporating German territory as an integral part of the territory of the

<sup>77</sup> In connexion with the Foreign Office certificate, see Lyons, *The Conclusiveness of the Foreign Office Certificate*, 23 B.Y.I.L., 1946, p. 240.

<sup>78</sup> E.g., Supreme Finance Court at Munich, Supreme Court of Austria, and Court of Appeal at Zurich (Mann, *The Present Legal Status of Germany*, 1 *International Law Quarterly*, 1947, pp. 314, 332). Cf. also *Re Hourigan* [1946], N.Z.L.R. 1.

<sup>79</sup> See for this view, Friedmann, *op. cit.*, p. 63; Mann, *loc. cit.*, p. 328; Jennings, *loc. cit.*, pp. 122, 133; Notes, 23 B.Y.I.L., 1946, p. 382. Professor Lauterpacht states that 'the international personality of Germany must be deemed to be suspended' (Oppenheim, vol. I, p. 520); same, *The Nationality of Denationalized Persons*, 1 *Jewish Yearbook of International Law*, 1948, p. 164, at p. 171.

<sup>80</sup> See Hague Convention IV in Higgins, *The Hague Peace Conferences*, 1909, pp. 245-53.

<sup>81</sup> Friedmann, *op. cit.*, p. 67; Mann, *loc. cit.*, p. 334.

<sup>82</sup> Jennings, *loc. cit.*, p. 124.

occupying Powers. Even in the absence of annexation German territory may still come under the sovereignty of the Allied Powers, albeit temporarily. The Allies had certainly claimed the right to 'determine' the 'status' and boundaries of Germany. If the status of a State is to be determined by foreign States it ceases to be a 'State' in the true sense of the word. Theories suggesting that Germany is under *condominium*<sup>83</sup> or tutelage<sup>84</sup> have been put forward. Whatever is to become of Germany, whether it is to be restored as a unified State or split up into a number of States, the German State, as such, must, for the moment, be regarded as eclipsed by *debellatio*.<sup>85</sup> [This interpretation is confirmed by the Judgment of the Nuremberg Tribunal, in which it was pointed out that the source of the Tribunal's jurisdiction 'was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered'.<sup>86</sup>]

It may be objected that if the State of Germany has ceased to exist and its sovereignty been transferred to the occupying Powers, State succession, resulting in the transfer of international rights and obligations and the change of nationality, should take place.<sup>87</sup> The answer to this objection is that it may be possible for a territory under *condominium* or tutelage to have a separate nationality and a fiscal autonomy, although the ultimate responsibility for these nationals and for the international debts would have to be borne by the Power exercising sovereign authority in the territory. This is the inevitable consequence of the assumption of the foreign relations of Germany by the Allies.<sup>88</sup> It is impossible to believe that without a corresponding obligation on their part the Allies should have a right to demand that their

<sup>83</sup> Kelsen, *The Legal Status of Germany according to the Declaration of Berlin*, 39 A.J.I.L., 1945, p. 518, at pp. 523-4; Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 142, 314-5; same, *The Judgment of Nuremberg*, 2 Year Book of World Affairs, 1948, p. 94, at pp. 103-4.

<sup>84</sup> Gros, *La Condition Juridique de l'Allemagne*, 50 R.G.D.I.P., 1946, p. 67, at p. 76.

<sup>85</sup> Kelsen, *loc. cit.*, p. 578; Schwarzenberger, *op. cit.*, p. 142, *loc. cit.*, p. 98; Gros, *loc. cit.*, p. 74; Oppenheim, vol. I, pp. 519-20.

<sup>86</sup> [Judgment of the International Military Tribunal at Nuremberg, 1946, Cmd. 6964 (1946), p. 38. See also the decision of the United States Military Tribunal at Nuremberg in the *Alstötter Trial* (1947), United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 6, 1948, p. 1, at pp. 28-34.]

<sup>87</sup> Mann, *loc. cit.*, p. 325; Jennings, *loc. cit.*, p. 122.

<sup>88</sup> See Section III of Proclamation of September 20, 1945, *loc. cit.*, n. 73 above; and see Occupation Statute, 1949, Art. 2 (c), Cmd. 7677 (1949).

legislation or acts in Germany be given extraterritorial effect in other States.<sup>89</sup> It has also been suggested that the exercise of territorial sovereignty is the only justification for the Allies to try and punish war criminals, especially with regard to atrocities committed against German nationals.<sup>90</sup>

As to the second point, the Control Council exercises powers of internal government,<sup>91</sup> but it receives authority from the occupying Powers, and not from the German State. As a matter of fact, the occupation authorities in Germany are at present operating not as one government, but as two governments [each of which has established a German administration with limited powers].<sup>91a</sup> Furthermore, the powers for external affairs of Germany have been reserved for the Allied Powers themselves.<sup>92</sup> The Control Council cannot, therefore, be regarded as a State Government in the full sense.<sup>93</sup> It is beyond the scope of reason to think that the Control Council can conclude a treaty with the Allies on behalf of Germany. [Nevertheless, the United Kingdom found it possible to sign a sterling agreement with Western Germany, which did not yet possess its own government, in August, 1949. This agreement was entered into by the United Kingdom and the Military Governments of Western Germany.<sup>94</sup>] It has been pointed out that if the view of the continued state of war is maintained, we shall have to arrive at the impossible conclusion that those Allied officials in the Control Council are technically at war with their own countries.<sup>95</sup>

<sup>89</sup> Such as Control Council Law No. 1 on nationality. (Jennings, *loc. cit.*, p. 125); Para. 7 (c) of Proclamation of September 20, 1945, regarding German diplomatic and consular property (*loc. cit.*, n. 68, p. 85 above); Para. 14 (a) regarding German assets abroad (*ibid.*). Switzerland entered into an agreement with the Allies for the liquidation of German property in Switzerland, although this right of the Allies to dispose of German assets was not accepted in principle by Switzerland (29 J.C.L., 1947, p. 56; also Mann, *German Property in Switzerland*, 23 B.Y.I.L., 1946, p. 354; the same, *German External Assets*, 24 *ibid.*, 1947, p. 239).

<sup>90</sup> Kelsen, *loc. cit.*, p. 525; Wright, *The Law of the Nuremberg Tribunal*, 41 A.J.I.L., 1947, p. 38, at p. 50.

<sup>91</sup> [The certificate issued by the Foreign Office in connexion with *R. v. Bottrill, ex parte Kuechenmeister* [1947], 1 K.B. 41, pointed out that 'the Allied Control Commission are the agency through which the government of Germany is carried on' (p. 42).]

<sup>91a</sup> [For an account of the Western administration see Green, *The New Régime in Western Germany*, 3 *World Affairs* (New Series), 1949, p. 368.]

<sup>92</sup> Mann, *loc. cit.*, p. 319; Occupation Statute, 1949, Article 2 (c); cf. Green, *loc. cit.*, pp. 370, 376-7.

<sup>93</sup> Jennings, *loc. cit.*, p. 127.

<sup>94</sup> [*The Times*, August 17, 1949.]

<sup>95</sup> Mann, *loc. cit.*, p. 334.

To regard Germany as extinct for lack of a sovereign Government raises one serious difficulty, namely, the legal position of the forthcoming peace treaty, if any. It has been suggested by Professor Kelsen that, owing to the disappearance of Germany as a State, the formal proclamation of peace must necessarily be a unilateral declaration of the occupying Powers. The new German Government, he suggests, might be asked to accept certain arrangements, not as a recognition of war guilt, but as confirmation of a situation which has been created by the present territorial sovereigns.<sup>96</sup>

It is evident from the above analysis that a State, in which one or more of the essential elements of statehood is wanting, ceases to be a State in international law. The cases of Austria and Germany do not constitute exceptions to this rule. While the British recognition of the continued existence of Germany may be conclusive from the point of view of municipal law, it does not possess any creative force in international law. Unless it be assumed that the fundamental concepts of international law have been altered, the British view of the continued existence of Germany would leave unexplained other acts of the Allied Governments which strongly indicate the contrary conclusion.

Another objection to the declaratory view, one raised by Professor Lauterpacht, is that the fact of State existence, upon which the declaratory writers rely as a key to their theory, may often turn out to be the very question at issue.<sup>97</sup> This fact, he argues, may often not be as self-evident as it is supposed, and its existence may frequently depend upon the judgment of foreign States expressed through recognition.

This objection is a formidable one. But coming from Professor Lauterpacht, it is less difficult to answer. For according to his own theory, recognition is a legal duty to be performed when conditions of fact so demand; it is declaratory of fact, though constitutive of rights.<sup>98</sup> There would be the same

<sup>96</sup> Kelsen, *loc. cit.*, p. 525; similarly, Gros, *loc. cit.*, p. 78. [In this connexion it is interesting to note that the preamble of the Occupation Statute for Western Germany points out that this Statute has been proclaimed by the three Military Governors 'in the exercise of the supreme authority which is retained by the Governments of France, the United States, and the United Kingdom'.]

<sup>97</sup> Lauterpacht, pp. 45-51; similarly, but less clearly, Anzilotti, *op. cit.*, vol. I, p. 165.

<sup>98</sup> Lauterpacht, p. 6.

necessity of, and, therefore, the same difficulty in, ascertaining whether the fact of the fulfilment of statehood had taken place. Unless recognition is considered as an act of unfettered discretion, we are bound in any case to look to the facts for guidance. It is hardly necessary to point out that the task of fact-finding requires a higher standard of accuracy according to Professor Lauterpacht's theory than according to the declaratory theory. For the latter view, recognition being a matter of evidence only, allows considerable lapse of time between the time that the State actually comes into existence, and the time of its recognition by others; while, according to the former view, recognition, to be strictly in accordance with international duty, must synchronise with the time that the State actually comes into existence. For this reason, if the difficulty of ascertaining the fact of State existence constitutes an objection to the declaratory theory, it must be submitted with great respect that that objection applies with even greater force to a constitutive theory wedded to the doctrine of the legal nature of recognition.]

This is not to argue that the fact of State existence is invariably self-evident and the task of ascertainment easy. The complicated conditions of international relations often give rise to anomalies which defy classification. It is only by strict adherence to principles that we are able to penetrate through an outer coat of uncertainties and irregularities into the core of solid truth. Professor Lauterpacht, in pointing out the impracticability of the automatic test of 'existence', argues that there are cases in which 'existence' alone is not sufficient to bring a new international person into being. He refers to the cases of 'Manchukuo', the Vatican City [and, shortly, the constituent Republics of the Soviet Union].<sup>99</sup> These are admittedly difficult cases, but not cases in which the application of principles is impossible.

With regard to 'Manchukuo', it has been pointed out elsewhere<sup>1</sup> that 'the fact that it exists' is in reality non-existent. This constitutes a positive proof that a 'State' not in fact existent does not acquire statehood through mere recognition, while it does not prove the contrary case that a State in fact

<sup>99</sup> Lauterpacht, pp. 45-51.

<sup>1</sup> See above, p. 59; below, p. 299, n. 47.

existing cannot acquire statehood for want of recognition. Contrarily, the logic of the constitutive theory would compel the conclusion that the personality of 'Manchukuo' could be 'created' by the Japanese recognition alone, regardless of whether it fulfilled the requirements of statehood. This clearly illustrates a basic incompatibility between the constitutive theory and the legal nature of recognition.

The essential elements of statehood of the Vatican City have, indeed, been reduced to a bare minimum. Yet it is nevertheless untrue to say that it had been 'created' by the recognition by Italy through the conclusion of the Lateran Treaty of 1929. Far from having 'created' the Vatican City, the Treaty was in reality a confirmation of the survival of the Papal State in its reduced form. Apart from the consideration that a recognition by treaty necessarily implies the prior existence of the parties,<sup>2</sup> Article 26<sup>3</sup> of the Treaty clearly stipulates that the recognition was mutual.<sup>4</sup> If we say that the Treaty had 'created' the Vatican City, can we stop short of saying that it had also 'created' Italy? Professor Lauterpacht believes that the reciprocal form of recognition was taken because of the necessity of recognition by the Vatican City of the annexation by Italy of the territory of the Papal State in 1870.<sup>5</sup> This is to admit that the Vatican City, prior to the signing of the Treaty, had rights to such territory. It could not have rights unless it had prior existence. In view of its diminutive size, the Holy See may probably be regarded as a State forming a class by itself. The Italian Court of Cassation referred to the Holy See as an international personality which is not necessarily a State, and declared that 'such personality was never denied to the Holy See even before the Lateran Treaty of February 11, 1929'.<sup>6</sup>

[The constituent Republics of the Soviet Union were granted a new status by the Constitutional Amendments of February, 1944. By these the Republics acquired 'the right to enter into direct relations with foreign States, conclude agreements with them, and exchange diplomatic and consular representatives

<sup>2</sup> See above, p. 42 *et seq.*; Goebel, *op. cit.*, p. 64, n. 1.

<sup>3</sup> *Documents on International Affairs*, 1929, p. 225.

<sup>4</sup> See Cumbo, *The Holy See and International Law*, 2 *International Law Quarterly*, 1948, p. 603.

<sup>5</sup> Lauterpacht, p. 57, n. 3.

<sup>6</sup> *Nanni and Others v. Pace and the Sovereign Order of Malta*, Italy, Court of Cassation (1935), *Annual Digest*, 1935-1937, Case No. 2, p. 5.

with them'.<sup>7</sup> The question immediately arises whether the effect of this change of status was to cause the various Republics to 'exist' as States. In accordance with the traditional constitutive view this was undoubtedly the case, for there could be nothing more conclusive of the existence of statehood than recognition by the parent State. But so far, it seems, no State has been willing to accept this act of creation and unilateral recognition as conclusive. Third States seemed to regard the actual control exercised by the Union Government as the more conclusive factor.<sup>8</sup> The fact that certain of such Republics were given seats in the United Nations was only the result of political bargaining.<sup>9</sup> The very fact that only two, and not all, of the Republics were admitted reflects the truth that they were not admitted as sovereign States. It should not be forgotten, however, that the admission of such Republics to the United Nations and the election of one of them to the Security Council may constitute recognition.<sup>10]</sup>

[If recognition does not create State personality, what, it has been asked, is its function?<sup>11</sup> Or, must recognition have a function?<sup>12</sup> It is believed that, by recognition, a State declares, admits, and accepts a state of facts<sup>13</sup> and outwardly manifests the mental comprehension of such facts,<sup>14</sup> [or, as Dr. Schwarzenberger puts it, the 'acknowledgment of a situation with the intention of admitting the legal implications of such a state of affairs'.<sup>15</sup>] To a similar effect is the Bogotá Charter of the Organisation of American States, 1948: 'Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.'<sup>16</sup>] It is an 'assurance given to a new State that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations'.<sup>17</sup> Such

<sup>7</sup> [Dobrin, *Soviet Federalism and the Principle of Double Subordination*, 30 *Grotius Transactions*, 1944, p. 260, at p. 261.]

<sup>8</sup> [*Ibid.*, p. 283; Gross, *The Charter of the United Nations and the Lodge Reservations*, 41 *A.J.I.L.*, 1947, p. 531, at p. 533.]

<sup>9</sup> [Byrnes, *Speaking Frankly*, 1947, p. 39; Sherwood, *The White House Papers of Harry L. Hopkins*, 1949, vol. 2, pp. 846-8, 865-6.]

<sup>10</sup> [See below, pp. 212, n. 9, 215.]

<sup>11</sup> Oppenheim, vol. I, p. 122

<sup>12</sup> Jaffe, *Judicial Aspects of Foreign Relations*, 1933, p. 101. See below, Part 3.

<sup>13</sup> Nys, *loc. cit.*, n. 21, p. 15 above, p. 293.

<sup>14</sup> Hervey, *Legal Effects of Recognition in International Law*, 1928, p. 8.

<sup>15</sup> [*A Manual of International Law*, 1950, p. 27.]

<sup>16</sup> [*Loc. cit.*, n. 6, p. 31 above, Article 10.]

<sup>17</sup> Hyde, vol. I, p. 148; Moore, *Digest*, vol. I, p. 72; Rivier, *op. cit.*, vol. 1, p. 57.



an assurance dispels uncertainty, and fortifies and stabilises the new State.<sup>18</sup> It is an estoppel against any subsequent denial of the existence of the State.<sup>19</sup> [It is strong evidence of the existence of the State, and might be conclusive for the internal purposes of the recognising State.<sup>20</sup> Lastly, it forms a starting point for the recognising and the recognised States to enter into closer political and commercial relationships than are required for a policy based on the bare necessities of live and let live.<sup>21</sup>] In conclusion, it may be stated that, although recognition does not create the international personality of the State, it is nevertheless of great importance from the political, economic and psychological points of view. This importance should not be overlooked, still less ignored, but should be appreciated and given its proper weight in the decisions of States on the question of recognition.

<sup>18</sup> Erich, *loc. cit.*, n. 48, p. 66 above, pp. 459-60, 468.

<sup>19</sup> Williams, *Some Thoughts on the Doctrine of Recognition in International Law*, 47 H.L.R., 1933-1934, p. 776, at pp. 793-794.

<sup>20</sup> Baty, *op. cit.*, p. 205; Williams, *Recognition*, 15 *Grotius Transactions*, 1929, p. 53, at p. 71 *et seq.*; Article 8 of the Resolution of the Institute of International Law, 30 A.J.I.L., 1936, Supplement, p. 186; below, p. 250 ff.

<sup>21</sup> Williams, *loc. cit.*, p. 53.

## CHAPTER 3

### RECOGNITION OF STATES IN PRACTICE

THE present chapter is not intended to include a discussion of the practice concerning the recognition of States in all its ramifications<sup>1</sup>; it is confined to answering the question: to what extent States have, in their practice, manifested their adoption of the declaratory principle. The answer may be sought in the words and deeds of statesmen and the pronouncements of courts of law.

#### § 1. OFFICIAL OPINIONS

[The official attitude of the British and American governments has been, on the whole, to regard recognition as an acknowledgment of facts, as a declaration that a foreign community had in fact acquired the qualifications of statehood, and as an intimation of willingness to enter into relations with such a community.] This attitude took concrete shape during the revolution of the Spanish Colonies in America and has received further confirmation on subsequent occasions. The revolt of the Spanish Colonies, although not the first case in which the question of recognition had occurred,<sup>2</sup> was certainly the most important occasion for the formation of the Anglo-American practice in this matter. Hall speaks of their conduct on that occasion as a 'typical example of recognition given upon unimpeachable grounds'.<sup>3</sup>

The spark of the independence movement in Latin America was first set alight by the French invasion of Spain in 1808. The loyal 'juntas' originally formed in the American Colonies in support of the Spanish Regency against the French invaders were, however, soon transformed into centres of separatist movements. The struggle raged indecisively for many years. British com-

<sup>1</sup> These are dealt with under appropriate headings in Parts 3, 4, 5.

<sup>2</sup> For earlier cases of recognition see Phillimore, *op. cit.*, n. 21, p. 15 above. vol. II, p. 21.

<sup>3</sup> Hall, p. 108. For a historical study of the British and American policy of this period, see Paxson, *The Independence of the South American Republics*, 1903, *passim*; Goebel, *op. cit.*, n. 21, p. 15 above, pp. 116-41.

mercial interests, which had already developed a flourishing trade with the revolting colonies, pressed for the regularisation of this trade. In June, 1822, an Act was passed in the British Parliament regulating direct trade between Britain and territories 'in *America* or the *West Indies*, being or having been a Part of the Dominions of the King of *Spain*'.<sup>4</sup> This action was confidentially admitted by a Foreign Office official to be an acknowledgment of the existence of these Colonies as States.<sup>5</sup> Lord Londonderry defended the British action on the ground that, since the Spanish Government was unable effectively to assert its control, the necessity of the situation compelled the establishment of relations in some other form. He conceived of recognition as nothing more than the forming of some 'recognised and established relations'.<sup>6</sup> This idea was reiterated in a Foreign Office memorandum for use in the Congress of Verona, in which it was stated:

'The Question then resolves itself into one, rather as to the mode of our Relations, than as to whether they (*i.e.*, the Spanish Provinces) shall, or shall not subsist to the extent, in the matter of Right, as regulated by the Law of Nations.'<sup>7</sup>

In England there seems to have been an opinion current at that time which distinguished between recognition by the parent State and that by third States: the one constitutive, the other declaratory.<sup>8</sup> Indeed, it cannot be denied that recognition by the parent State is more vital than recognition by foreign States. But its importance is more political than legal in character. Recognition by the parent State indicates the surrender of power, if any, and the relinquishment of any further attempt to reconquer by force. It contributes to the creation of the political fact of independence, which forms the basis of the legal personality of the new State. It does not constitute that personality. Its recognition no doubt tranquillises and stabilises the new régime; but its non-recognition need not invalidate it.

The policy of Canning was at first to persuade Spain to concur

<sup>4</sup> 3 Geo. IV, C. 43, s. 3.

<sup>5</sup> Smith, vol. I, p. 122.

<sup>6</sup> *Ibid.*, p. 123.

<sup>7</sup> *Ibid.*, p. 125.

<sup>8</sup> Speech of Sir James Mackintosh in the House of Commons, June 15, 1824. Parl. Deb., New Ser., vol. 11 (1824), col. 1347 ff.; speech by Canning on the same day, *ibid.*, col. 1397; Canning to Ward in Mexico, September 9, 1825, Smith, vol. I, p. 126.

in the recognition, in order to forestall complaints.<sup>9</sup> Later, in despair at Spain's stubbornness, he decided to proceed with recognition before it was too late.<sup>10</sup>

In October, 1822, a commission of inquiry was sent out to Mexico to report on whether Mexico had established a government, which was in fact independent.<sup>11</sup> Similar information was sought in other Spanish Colonies.<sup>12</sup> It may be seen from these proceedings that the British Government considered recognition as the acknowledgment of facts which required impartial ascertainment.<sup>13</sup>

In reply to a Spanish protest against British negotiations with the insurgents, Canning declared that the separation of the Colonies was a fact. 'But out of that separation', he argued, 'grew a state of things, to which it was plainly the duty of the British Government . . . to conform it's (*sic*) measures, as well as it's (*sic*) language. . . .' It would be of no service to Spain to continue to call a possession of Spain that in which all Spanish occupation and power had actually been extinguished and effaced.<sup>14</sup>

The revolt of Brazil under Dom Pedro against his father, King John of Portugal, broke out in September, 1822. In a dispatch of February 15, 1823, Canning seemed to have taken for granted the existence of the new Empire, and thought that the only obstacle standing in the way of 'the establishment of a cordial amity and intercourse between Great Britain and Brazil' was the question of the slave trade.<sup>15</sup> In January, 1825 he wrote: 'With Brazil, the fact of Independence is practically assured.'<sup>16</sup> Here, as in the Spanish case, Canning did not seem to think that recognition had much to add to an independence established *de facto*.

A similar development in the practice concerning recognition took place in the United States during this period. The soundness

<sup>9</sup> Parl. Deb., New Ser., vol. 12 (1824), col. 1397.

<sup>10</sup> Smith, vol. I, p. 132.

<sup>11</sup> *Ibid.*, p. 129.

<sup>12</sup> *Ibid.*, p. 131.

<sup>13</sup> See this view expressed in Canning's instructions to Woodbine Parish, Consul-General to Buenos Aires, August 23, 1824 (Paxson, *op. cit.*, p. 234).

<sup>14</sup> Smith, vol. I, p. 166.

<sup>15</sup> *Ibid.*, p. 187.

<sup>16</sup> *Ibid.*, pp. 195-6.

of the Jeffersonian doctrine of recognition, previously applied to the recognition of governments,<sup>17</sup> found further proof in its application to the recognition of States. In a letter to the President, Secretary of State Adams maintained that there is a stage when the granting of recognition becomes both a right and a duty of third States. 'It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate.'<sup>18</sup> Neutrals are indeed entitled to judge for themselves whether that fact exists, but they must 'infer the right from the fact, but not the fact from the right'.<sup>19</sup> In another dispatch he said, 'It is the mere acknowledgment of existing facts with the view to the regular establishment with the nations newly formed of those relations, political and commercial, which it is the moral obligation of civilised and Christian nations to entertain reciprocally with one another'.<sup>20</sup>

In his message to Congress, March 8, 1822, President Monroe, referring to the right of Buenos Aires to rank with independent nations, said, 'Buenos Aires assumed that rank by a formal declaration in 1816, and has enjoyed it since 1810 . . .'.<sup>21</sup> Obviously, in his opinion, that rank could be assumed without the aid of external recognition.

⌈The idea that recognition is a question of fact has been repeated frequently by American statesmen.<sup>22</sup>⌋ A typical formulation of that idea is found in President Grant's message of December 7, 1875. Having laid down the conditions which make recognition lawful, he declared:

'In such cases other nations simply deal with an actually existing condition of things, and recognise as one of the powers of

<sup>17</sup> Below, p. 120 *et seq.*

<sup>18</sup> Wharton, *Digest*, vol. I, pp. 521-2; Moore, *Digest*, vol. I, pp. 78-9. Note the incongruity of dates as recorded in the two books; Moore, August 24, 1818; Wharton, August 24, 1816.

<sup>19</sup> Moore, *op. cit.*, p. 79.

<sup>20</sup> Wharton, *op. cit.*, p. 524.

<sup>21</sup> Moore, *op. cit.*, p. 85.

<sup>22</sup> See, for instance, speech of Henry Clay in Congress, March 24, 1818 (Mal-lory, *Life and Speeches of Henry Clay*, 1860, vol. I, p. 391); his report to the Senate Committee on Foreign Relations, June 18, 1836 (Moore, *op. cit.*, p. 96); Secretary Buchanan to Minister Harris in the Argentine, March 30, 1846 (*ibid.*, p. 91); President Jackson's message to Congress, December 21, 1836 (*ibid.*, p. 98); Secretary Forsyth to Mr. Castillo, Mexican Chargé d'Affaires, March 17, 1837 (*ibid.*, p. 102).

the earth that body politic which has, in fact, become a new power. In a word, the creation of a new State is a fact.'<sup>23</sup>

On several occasions official documents which admitted the existence of States still unrecognised were issued. Thus, in a letter of July 24, 1922, Secretary Hughes advised the President that Estonia, Latvia and Lithuania, having been in continuous existence since 1919, ought to be recognised. The announcement subsequently made declared that 'In extending them recognition on its part, the Government of the United States *takes cognizance of the actual existence* of these Governments during a considerable period of time . . .'.<sup>24</sup>

Like the British Government, the United States Government also resorted on many occasions to commissions of inquiry to ascertain the fact to be acknowledged.<sup>25</sup>

Despite consistent and overwhelming proof of the adoption of the declaratory principle in Anglo-American practice, it would nevertheless be untrue to say that there have never been any isolated incidents or stray remarks by responsible statesmen which might give colour to the opposite contention.<sup>26</sup> The period of the American Civil War was one of reaction against *de factoism*. It is not surprising, therefore, to find Secretary Seward taking a view contrary to the declaratory theory, when he said: 'To recognise the independence of a new State and so favour, possibly determine, its admission into the family of nations, is the highest possible exercise of sovereign power. . .'.<sup>26</sup> On April 7, 1908, the State Department instruction to the American Ambassador in Paris contained the somewhat curious remark that 'The Czardom of Bulgaria cannot be *de facto* until made so by the recognition of the Powers'.<sup>27</sup> The subsequent recognition of Bulgaria in 1909, however, took the form of a message of congratulation,<sup>28</sup> which seemed to indicate the welcoming of something the existence of which had been presumed, but not created. [A more recent instance of United States practice is to

<sup>23</sup> Moore, *Digest*, vol. 1, p. 107.

<sup>24</sup> Hackworth, vol. I, p. 201. Italics added. See, similarly, the recognition of the Kingdom of Hejaz and Nejd, May 2, 1931, *ibid.*, p. 219.

<sup>25</sup> See Wharton, *op. cit.*, pp. 187, 188, 527; Moore, *op. cit.*, p. 81; Hackworth, *op. cit.*, pp. 197-8.

<sup>26</sup> Moore, *op. cit.*, p. 106.

<sup>27</sup> Hackworth, *op. cit.*, p. 202.

<sup>28</sup> *Ibid.*

be found in the statement of the American delegate to the United Nations in connexion with the *de facto* recognition of Israel in 1948:

‘When it (the right to grant *de facto* recognition to a Provisional Government) was exercised by my Government, it was done as a practical step, in recognition of realities: the existence of things, and the recognition of a change that had actually taken place.’<sup>28a</sup>].

The doctrine which guided Anglo-American policy also prevailed in other countries. Thus, the Belgian Foreign Minister declared in 1861:

‘...reconnaître un autre gouvernement n’est que reconnaître un fait. . . . En reconnaissant le nouveau royaume d’Italie, nous reconnaissons, à leur exemple, un état de possession, sans nous constituer juges des événements qui l’ont établi. . . .’<sup>29</sup>

As may be expected, the declaratory theory found easy acceptance among Latin American statesmen.<sup>30</sup> The four American nations who signed the Convention of Montevideo, December 26, 1933—the United States, Chile, the Dominican Republic, and Guatemala—agreed to the following:

‘Article 3. The political existence of the State is independent of recognition by the other States. . . .

‘Article 6. The recognition of a State merely signifies that the State which recognises it accepts the personality of the other with all the rights and duties determined by international law. . . .’<sup>31</sup>

✓ [The adoption of the declaratory view requires that the *de facto* existence of the State be taken as the sole consideration in deciding the question of recognition. Considerations of profit, political advantages and self-interest should be disregarded.<sup>32</sup>] From the lawyer’s point of view, however, a distinction should be drawn between a motive and its outward manifestation. It is with the latter that he is chiefly concerned. The conduct of Great Britain and the United States with regard to the Spanish American Republics was no less, if no more, motivated by political

<sup>28a</sup> [Security Council Official Records, No. 68, 3rd Year, p. 16.]

<sup>29</sup> Jessup, *The Spanish Rebellion and International Law*, 15 *Foreign Affairs*, 1937, p. 260, at pp. 275-6.

<sup>30</sup> *Fontes Juris Gentium*, Ser. B, Sectio I, Tomus I, Pars I, pp. 144-5.

<sup>31</sup> 28 A.J.I.L., 1936, Supplement, p. 76.

<sup>32</sup> For a criticism of power politics in recognition, see Lauterpacht, pp. 32-7.

considerations than any other case of recognition. But it is not for that reason less impeccable, nor less exemplary. Great Britain was, in the first place, under treaty obligations to Spain not to countenance any withdrawal from the allegiance to the Spanish monarch.<sup>33</sup> The European situation, moreover, required that France be prevented from availing herself of the opportunity offered by the dissensions in the Spanish Empire to weaken the Allied cause.<sup>34</sup> On the other hand, there was general sympathy in England with the cause of the insurgents, and powerful mercantile interests were impatient to establish trade with Latin America on a more regular basis.<sup>35</sup> Moreover, to ignore the claims of the revolting Provinces altogether would be to throw them into the embrace of France.<sup>36</sup> It was the balance of these considerations which determined the course actually taken.

In the United States, too, general sentiment would have urged an earlier recognition.<sup>37</sup> But actual recognition was delayed for three years on account of the negotiations over the purchase of Florida.<sup>38</sup>

It is clear that motives, however questionable, do not necessarily give rise to illegitimate actions. [Political considerations become objectionable only when manifested in actual conduct, such as in premature recognition, in withholding recognition in defiance of actual facts, or in offering recognition as a price for political concessions. Such practices are rightly to be condemned.] ✓

[Premature recognition should properly be considered as a species of intervention, rather than of recognition.] The undertaking is generally viewed as a political adventure with full knowledge of its illegality and its consequences. The recognising State seldom seeks to justify its action upon legal principles of recognition. Premature recognition is, therefore, not illustrative of the practice of States in matters of recognition. It is not strictly germane to the subject under discussion. Thus the ✓

<sup>33</sup> Smith, vol. I, p. 117. This was later repudiated by Canning in his despatch to the Spanish Minister in London, March 25, 1825, *ibid.*, pp. 163-4.

<sup>34</sup> *Ibid.*, p. 118. British policy in Spanish America was, in fact, merely one of the ramifications of European politics (Paxson, *op. cit.*, p. 179).

<sup>35</sup> Smith, *op. cit.*, p. 122.

<sup>36</sup> *Ibid.*, p. 118.

<sup>37</sup> Moore, *Digest*, vol. I, p. 83.

<sup>38</sup> Jaffe, *op. cit.*, p. 104; Paxson, *op. cit.*, pp. 136, 169; Goebel, *op. cit.*, pp. 128-31, 133-4.



recognition of the United States by France in 1778, and the recognition of Greece and Belgium by the Great Powers in 1827 and 1831 have properly been discussed by Sir Robert Phillimore under the heading of 'Intervention'.<sup>39</sup>

The transformation of the British former colonies into independent States *via* dominion status is a perplexing, but instructive, instance of recognition. It illustrates the futility of the constitutive doctrine in such a circumstance. The participation of the Dominions in the Peace Treaties and their membership in the League of Nations no doubt assured for them a species of international personality. If these facts imply recognition, then, from the point of view of the constitutive theory, they must be considered from that moment in possession of full-grown statehood. But that simple solution does not correspond with the views expressed by competent authorities. In 1921, Mr. Lloyd George was still telling the House of Commons that 'The instrument of the foreign policy of the Empire is the British Foreign Office. That had been accepted by all the Dominions as inevitable'.<sup>40</sup> The executive, legislative and judicial sovereignty over the whole Empire was then still considered as vested in the British organs of Government at Westminster. It was not until 1924 that the Irish Free State had its separate diplomatic representative in the United States, Canada and the Union of South Africa came later in 1926 and 1929.<sup>41</sup>

Did the Statute of Westminster, 1931,<sup>42</sup> constitute recognition of independence? There is no direct answer. By Section I of the Statute, the title of 'Dominion' was conferred upon Canada, Australia, South Africa, the Irish Free State,<sup>43</sup> New Zealand and Newfoundland<sup>44</sup>; yet the remainder of the Statute did not apply immediately to Australia, New Zealand and Newfoundland until adopted by the Parliaments of these

<sup>39</sup> Phillimore, *Commentaries upon International Law*, vol. I (1879), p. 553 *et seq.*; also see Harcourt, *Letters by Historicus on Some Questions of International Law*, 1863, pp. 5-6; *Keith's Wheaton*, vol. I, p. 55; above, p. 54, n. 97.

<sup>40</sup> Quoted in Scott, *The End of Dominion Status*, 38 A.J.I.L., 1944, p. 34, at p. 36.

<sup>41</sup> Hackworth, vol. I, pp. 64-6.

<sup>42</sup> 22 Geo. 5, c. 4.

<sup>43</sup> Eire became an independent Republic on April 18, 1949, see Irish Republic Act (No. 22 of 1948) and Ireland Act, 1949 (12 & 13 Geo. 6, Ch. 41).

<sup>44</sup> India and Pakistan became Dominions on August 15, 1947, Indian Independence Act, 1947 (10 & 11 Geo. 6, Ch. 30; s. 1), and Ceylon on February 10, 1948, Ceylon Independence Act, 1947 (11 Geo. 6, Ch. 7, s. 2).

Dominions (s.10). Thus, New Zealand and Newfoundland never came under the provisions of the Statute, and Australia not until 1943.<sup>45</sup> To them, at least, the 'recognition' given by the Statute did not produce constitutive effect.

In *Murray v. Parkes*, 1942,<sup>46</sup> the question to be decided was whether a person claiming to be a citizen of Eire could be exempted from military service on the ground of alienage. The issue turned upon the status of Eire. It was held that the Statute of Westminster did not grant the right of secession to Eire, and that the Eire (Confirmation of Agreement) Act, 1938, did not recognise secession to have taken place. Singleton J. said: 'I fail to find anything to show me that the Government which was set up in that part of Ireland which was formerly the Irish Free State has been recognised by His Majesty's Government as a sovereign, independent, democratic State.'<sup>47</sup>

This statement seems to be contradicted by the fact that Eire remained neutral throughout the war against Germany. While Australia and New Zealand issued declarations to the effect that they considered themselves at war as the result of the British declaration of war on September 3, 1939, the Union of South Africa issued a separate declaration of war on September 6 and Canada on September 10. As regards the declaration of war against Japan, each Dominion acted separately. Through gradual transformation, the Dominions, excepting Newfoundland,<sup>48</sup> are now in possession of the normal status of independent States.<sup>49</sup> It does not seem, however, that this state of independence is attributable to any particular act of a special creative force emanating from Great Britain or any other State. [This is not so with the new Dominions of Pakistan and Ceylon, which

<sup>45</sup> Scott, *loc cit.*, p. 39.

<sup>46</sup> [1942] 2 K.B. 123.

<sup>47</sup> *Ibid.*, p. 136.

<sup>48</sup> Its dominion status had been suspended by the Newfoundland Act, 1933 (24 Geo. 5, c. 2). It has now become a province of Canada, British North America Act, 1949 (12 & 13 Geo. 6, Ch. 22).

<sup>49</sup> See Oppenheim, vol. I, pp. 185-90; Cobbett, vol. I, pp. 38-9; Scott, *loc. cit.*, p. 34 *et seq.*; [Schwarzenberger, *A Manual of International Law*, 1950, p. 32. See also the Declaration of Dominion Prime Ministers which recognises that India will remain within the Commonwealth even after becoming 'an independent sovereign republic', *The Times*, April 28, 1949; Jennings, *The Commonwealth Conference, 1949*, 25 B.Y.I.L., 1948, p. 414; FitzGerald, *Further Developments in the British Commonwealth of Nations*, 3 *World Affairs* (New Series), 1949, p. 269.]

owe their existence as independent Dominions to Acts of the English Parliament. In the case of Pakistan, the State Department, on August 14, 1947, pointed out that 'the Dominion of Pakistan becomes a new member of the family of nations on August 15', the date stipulated in the India Independence Act.<sup>50</sup> No such statement was necessary in connexion with the Dominion of India, for she succeeded to the international personality of the former Empire of India. In her case the Government of the United States agreed to appoint an Ambassador as early as October, 1946, and the Indian Ambassador in Washington presented his letters of credence six months before the establishment of the Dominion.<sup>51</sup> Such independence, whether recognised or not, exists of its own strength.

## § 2. JUDICIAL OPINIONS

Owing to the acceptance of the doctrine of judicial self-limitation,<sup>52</sup> English and American courts have seldom had occasion to give a clear-cut judicial pronouncement on the nature of recognition. Courts generally refuse to take account of the existence of a State not recognised by the political department. This, however, is far from saying, as some people would assume, that the courts are in favour of the constitutive view, for to prove the acceptance of the constitutive view it is necessary to show that, in spite of admitting the *fact* of the existence of the new State, the court nevertheless refuses to attribute *legal* personality to it so long as it has not been recognised by the Government. Under the doctrine of judicial self-limitation, the courts refuse to entertain *even the fact* that a body of men had been politically organised, unless the vital evidence is provided by the Government. Recognition by the Government, or a certificate to the court from the relevant executive department, is regarded as 'conclusive evidence' binding upon the Court.<sup>53</sup> For this reason, although the refusal of the courts to give effect to the rights under international law of unrecognised States does seem to give colour to the constitutive argument, yet, as long as the doctrine of judicial self-limitation prevails, courts do not really have the

<sup>50</sup> Dept. of State Press Release No. 656, August 14, 1947.

<sup>51</sup> [*Ibid.*, No. 753, October 23, 1946; No. 785, February 28, 1947.]

<sup>52</sup> See below, p. 240 *et seq.*

<sup>53</sup> Below, pp. 250-1.

opportunity to address themselves to the question of the effect of recognition on its own merits.

On the other hand, where there is a departure from the doctrine of judicial self-limitation or where the doctrine is not involved, there is definite evidence that the courts are in favour of the declaratory view. Thus, in the two cases of well-known departures from the doctrine (*Consul of Spain v. La Concepcion* (1819) and *Yrisarri v. Clement* (1826)),<sup>54</sup> it was held that, the factual existence of the new States in question having been proved, their rights under international law must be allowed. It seems that a court which breaks away from the doctrine of judicial self-limitation would almost certainly find itself in alliance with the declaratory theory, because in asserting the existence of a state of facts independently of the views of the political department the court cannot stop short of attributing to such state of facts the consequences of law. In the case of *Consul of Spain v. La Concepcion*, the declaratory view of Justice Johnson is pronounced. He said:

‘The actual possession and long exercise of all the attributes of a state of independence may be legally resorted to without giving just cause of umbrage to a nation that does not possess the power to subjugate a revolted colony. There exist many nations at this day which may claim of courts of international law all the rights of independent nations and may be judicially recognised as such, notwithstanding no act of government has acknowledged them in that capacity.’<sup>55</sup>

In a more recent case, *Wulfsohn v. R.S.F.S.R.* (1922), the New York Court of Appeals held that:

‘Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact, not a theory. For its recognition does not create the State, although it may be desirable.’<sup>56</sup>

<sup>54</sup> 1819, 2 Wheel. Cr. Cas. 597; 1826, 3 Bing. 432 (see below, p. 244).

<sup>55</sup> 2 Wheel. Cr. Cas. 597, Fed. Cases No. 3137 (D.C.S.C. 1819). Reversed on additional findings of facts (1821), 6 Wheat. 235. Quoted in Jaffe, *op. cit.*, pp. 133-4.

<sup>56</sup> (1922) 192 N.Y. Supp. 282, (1922) 195 N.Y. Supp. 472, (1923) 234 N.Y. 372, 375; Green, *International Law Through the Cases*, 1951, No. 35. Although this case was concerned with unrecognised governments, the argument quoted has direct reference to the recognition of States.

In cases in which the courts are unhampered by considerations of judicial self-limitation, the declaratory view seems to have found wide acceptance. First among these, we must mention the dictum of Abbott C.J. in *Doe d. Thomas v. Acklam* (1824). In that case the Chief Justice, in answer to the question whether the Definitive Treaty of 1783 between Great Britain and the United States had constituted the independence of the latter, said:

‘This recognition of independence was made, *or rather confirmed*, on the 3rd of September, 1783, by a treaty between his late Majesty and the United States of *America*. . . . Between the signing of the articles (*i.e.*, Preliminary Articles, November 30, 1782) and of the definitive treaty, several Acts were passed, mentioning the United States of America, and the subjects and citizens of those States: and the name of colonies or plantations is no longer used (See 23 G.3, C.26; C.39 and 80). Many Acts of Parliament, wherein the United States of *America* are mentioned and treated as a distinct and independent nation, have been since passed; . . .’<sup>57</sup>

This opinion is the more remarkable since it was pronounced by a court of the country against which the revolution had taken place.

It is almost natural for courts of States whose legal existence are in issue to rely heavily upon the declaratory theory. The United States Supreme Court held on several occasions that the independence of the United States commenced *de facto* and *de jure* as from July 4, 1776.<sup>58</sup>

The courts of States coming into existence after the First World War have been at one in holding that the existence of their States antedated their recognition in the Peace Treaties. Thus it was forcefully maintained by the Czechoslovak Supreme Administrative Court that

<sup>57</sup> 2 B & C, 779, 795 (italics added).

<sup>58</sup> *Ware v. Hylton* (1796), 3 Dall. 199, 224; *McIlvaine v. Coxe's Lessee* (1808), 4 Cranch 208, 212; *Harcourt v. Gaillard* (1827), 12 Wheat. 523, 527. *Contra*, *United States v. Hutchings* (1817), Fed. Cases No. 15, 429, 2 Wheel. Cr. Cas. 543, cited in Hervey, *op. cit.*, pp. 10-11. In the case of *Andrew Allen*, 1799, the former view was insisted upon by the American members of the British-American Mixed Commission established under Article 6 of the Jay Treaty (Moore, *International Adjudications*, vol. III, p. 244). But the majority of the Commissioners maintained that until the Treaty of 1783, the American Colonies were in a state of rebellion against Great Britain (*ibid.*, pp. 175, 303). See also *Barclay v. Russell* (1797), 3 Ves. Jun. 423, below, p. 173.

'The contention is erroneous that a State comes or could come into existence by international recognition. On the contrary, the international recognition . . . necessarily takes the existence of an independent State for granted. For the existence of a State such recognition is not necessary in the same way as such recognition itself would not be sufficient for this purpose.'<sup>59</sup>

If national courts of nascent States may be accused of being carried away by nationalistic sentiments in disregard of legal principles,<sup>60</sup> such a charge can certainly not be levelled against international tribunals and courts of third States, which arrive at the same conclusion. Thus, the German *Reichsgericht* in Criminal Matters, emphatically held 'that in May, 1919, the Czechoslovak Republic was in fact established and that its Government was effectively in power since January, 1919. The question of recognition was irrelevant'.<sup>61</sup>

In *Bohemian Union Bank v. Administrator of Austrian Property* (1927)<sup>62</sup> an English Court upheld the view that Czechoslovak citizenship became effective as from October 28, 1918, the date on which the National Committee assumed actual power, and not from the date of the coming into force of the Treaty of St. Germain, July, 1920.

The Swiss Court of Appeal of Zurich, in *In re M. and O.* (1921),<sup>63</sup> while rejecting the Polish theory of national continuity since the Third Partition, was, nevertheless, content with saying that Poland did not exist before gaining its actual independence.

<sup>59</sup> Decision of the Czechoslovak Supreme Administrative Court (1919), *Annual Digest*, 1919-1922, p. 17, n. c. See similar Czechoslovak decisions: *Rights of Citizenship (Establishment of Czechoslovak State) Case* (1921), *ibid.*, Case No. 5; *Rights of Citizenship (Establishment of Czechoslovak Nationality) Case* (1921), *ibid.*, Case No. 6; *In Re X (Establishment of Czechoslovak Nationality) Case* (1923), *ibid.*, 1923-1924, Case No. 2; *Establishment of Czechoslovak State Case* (1925), *ibid.*, 1925-1926, Case No. 8. Similar Austrian cases: *A.L.B. v. (Austrian) Federal Ministry for the Interior*, Austrian Administrative Court, Vienna (1922), *ibid.*, 1919-1922, Case No. 7; *H.E. v. Federal Ministry of the Interior* (1925), *ibid.*, 1927-1928, Case No. 11. Polish Courts, however, made more extravagant claims. They held that Poland had continued to exist ever since the Third Partition. See Polish Supreme Court decisions: *Republic (Poland) v. Weishole* (1919), *ibid.*, 1919-1922, Case No. 17; *Republic (Poland) v. Felsenstadt* (1922), *ibid.*, Case No. 16; *Republic (Poland) v. Pantol* (1922), *ibid.*, Case No. 18; *Poland v. Harajewica* (1923), *ibid.*, 1923-1924, Case No. 1.

<sup>60</sup> Lauterpacht, pp. 43-4.

<sup>61</sup> *Counterfeiting of Stamps (Czechoslovakia) Case* (1920), *Annual Digest*, 1919-1922, Case No. 24.

<sup>62</sup> [1927] 2 Ch. 175.

<sup>63</sup> (1921), *Annual Digest*, 1919-1922, Case No. 42.

The German-Polish Mixed Arbitral Tribunal was more precise. It decided in *Poznanski v. Lentz and Hirschfeld*<sup>64</sup> that Poland existed as an independent State before the Treaty of Versailles. The same tribunal in *Deutsche Continental Gasgesellschaft v. Polish State* (1929) expressly embraced the declaratory doctrine. Thus, it said:

‘According to the opinion rightly admitted by the great majority of writers on international law, the recognition of a State is not constitutive but merely declaratory. The State exists by itself and recognition is nothing else than a declaration of its existence, recognised by the States from which it emanates.’<sup>65</sup>

[Despite this express statement it must be borne in mind that the Tribunal mainly relied on the assertion of a German act of *de jure* recognition of Poland in November, 1918.<sup>66</sup>]

The examination of the practice of States has shown that *de factoism* has undoubtedly been the backbone of the Anglo-American policy of recognition. Such a policy is based upon the view that recognition registers, but does not create, a situation of fact. British and American courts, owing to their adherence to the doctrine of judicial self-limitation, refuse generally to pronounce upon a situation in a foreign country on which the executive department chooses to be silent. In those exceptional cases, where the doctrine of judicial self-limitation is disregarded or not involved, their view has been undoubtedly in favour of the declaratory theory. The same is true of numerous cases decided by international tribunals and courts of other States, [although the practice of the Permanent Court of International Justice appears to favour the constitutive view.<sup>67</sup> The International Court of Justice, however, when discussing the international personality of the United Nations in the course of the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), veered towards a rather authoritarian interpretation of the declaratory doctrine of recognition. Apparently, even

<sup>64</sup> (1924), 4 M.A.T., 1925, p. 353.

<sup>65</sup> 9 M.A.T. (1929-1930), 336, at pp. 343-346. See, for a review of cases in support of this view, Rankin, *Legal Problems of Poland after 1918*, 26 *Grotius Transactions*, 1940, p. 1, at pp. 5-9.

<sup>66</sup> [Schwarzenberger, *op. cit.*, n. 55, p. 22 above, p. 64.]

<sup>67</sup> [See, for example, *Certain German Interests in Polish Upper Silesia*, 1926 (Series A, No. 7), and Schwarzenberger, *op. cit.*, pp. 62-64.]

non-members are held to be bound to accept the international personality of the United Nations: 'The Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone'.<sup>68</sup>]

<sup>68</sup> [*I.C.J. Reports*, 1949, p. 174, at p. 185.]





## PART TWO

### *RECOGNITION OF GOVERNMENTS*<sup>1</sup>

<sup>1</sup> The term 'Government' when used unqualifiedly in this work means '*the government of the State*'. It includes recognised governments and unrecognised general *de facto* governments, but not local *de facto* governments, or local divisions of the government. The term '*local de facto governments*' includes the authorities of belligerent communities and the authorities of hostile military occupants.



## CHAPTER 4

### RECOGNITION OF GOVERNMENTS AND OF STATES

INTERNATIONAL lawyers are almost unanimously of opinion that, in principle, the personality of a State is not affected by a change in the form of its government or of the persons composing its government.<sup>2</sup> Thus France remained the same international person despite revolutionary changes in government in 1815, 1830, 1848, 1852, 1870, 1940 and 1946. Likewise, the personality of Great Britain was unaffected by the revolutions and restorations of 1649, 1660 and 1688,<sup>3</sup> [while in 1949 the transition of Eire from a Dominion to an independent Republic and of India from an Empire to a Dominion took place without any change in the international personality of the two States]. The view is also to be seen in State practice. In a communication to the Attorney-General of the United States, the State Department defined its position with respect to Mexico, at that time—1922—under a government not recognised by the United States, as follows:

‘The Government of the United States has not accorded recognition to the administration now functioning in Mexico, and therefore has at present no official relations with that administration. This fact, however, does not affect the recognition of the Mexican State itself, which for years has been recognised by the United States as an “international person”, as:

<sup>2</sup> Hall, p. 21; Oppenheim, vol. I, p. 148; Grotius, *De Jure Belli ac Pacis, Libri Tres*, Bk. II, Ch. IX, s. 8; *Dana's Wheaton*, s. 22; Westlake, *op. cit.*, n. 15, p. 15 above, vol. I, p. 58; Rivier, *op. cit.*, n. 23, p. 15 above, vol. I, p. 62; Bluntschli, *op. cit.*, n. 10, p. 14 above, s. 40; Hyde, vol. I, pp. 158-9; Fauchille, *op. cit.*, n. 24, p. 15 above, t. I, Pt. I, pp. 319, 338-43; Fiore, *op. cit.*, n. 25, p. 15 above, Article 58; Moore, *Digest*, vol. I, p. 249; Rougier, *Les Guerres Civiles et le Droit des Gens*, 1903, p. 483.

<sup>3</sup> It has been suggested that in absolute monarchies the personality of the State is identified with the person of the monarch (Wright, *Suits brought by Foreign States with Unrecognised Governments*, 17 A.J.I.L., 1923, p. 742, at p. 743). Whether this is true or not does not seem to affect the correctness of the proposition that personal compacts with defunct sovereigns do not survive the change of government (Grotius, *op. cit.*, Bk. II, Ch. XVI, s. 16; *Keith's Wheaton*, vol. I, p. 57).

that term is understood in international practice. The existing situation simply is that there is no official intercourse between the two States.’<sup>4</sup>

In an earlier case, *The Sapphire* (1870),<sup>5</sup> the Supreme Court of the United States declared that the deposition of Napoleon had no effect upon the sovereignty of France, which was the owner of the vessel in question. The successor government was competent to carry on a suit already commenced, and to receive the fruits of the litigation.

✓ In the *Lehigh Valley Railroad Co. Case* (1919-1927),<sup>6</sup> the suit commenced by the Ambassador of the provisional Russian Government was allowed to be carried on in the name of the ‘State of Russia’, after the extinction of the provisional Government. Mr. Justice Manton said :

‘The granting or refusal of recognition (of governments) has nothing to do with the recognition of the State itself. If a foreign State refuses the recognition of a change in the form of government of an old State, this latter does not thereby lose its recognition as an international person. . . . The suit did not abate by the change in the form of government in Russia; the State is perpetual and survives the form of its Government.’<sup>7</sup>

In the English case, *The Government of Spain v. The Chancery Lane Safe Deposit Ltd., De Reding and the Attorney-General and the State of Spain v. the same* (1939),<sup>8</sup> the litigation

<sup>4</sup> *Government of Mexico* (later changed into ‘the United States of Mexico’) v. *Fernandez*, Superior Court of Essex County, Mass., U.S.A., May, 1923, cited in Wright, *loc. cit.*, pp. 743-4; see also Hackworth, vol. I, p. 127.

<sup>5</sup> 11 Wall, 164, 168.

<sup>6</sup> *Russian Government v. Lehigh Valley R.R.* (1919), 293 Fed. 133; (1923) 293 Fed. 135; *Ex parte Lehigh Valley R.R.* (1924) 265 U.S. 573; *Lehigh Valley R.R. Co. v. State of Russia* (1927), 21 F (2d) 396; Hudson, pp. 89, 118.

<sup>7</sup> Circuit Court of Appeals, 21 F. (2d) 396, Hudson, p. 120. For similar decisions maintaining the identity of the State person despite change of government: *Agency of Canadian Car and Foundry Co. Ltd. v. American Can Co.* (1918), 253 Fed. 152, (1919) 258 Fed. 363; *Guaranty Trust Co. v. U.S.* (1938) 304 U.S. 126, 141; *Lepeschkin v. Gosweiler & Co.*, Federal Tribunal of Switzerland (1923), Hudson, p. 122, at pp. 123-4, *Annual Digest*, 1923-1924, Case No. 189; *Roselius & Co. v. Karsten*, District Court of Amsterdam (1926), *ibid.*, 1925-1926, Case No. 26; *Lowinsky v. Receiver in Bankruptcy of the Egyptisch-Türkische Handwerksigarettenfabrik ‘Jaka’ Ltd.*, District Court of Amsterdam (1932), *ibid.*, 1931-1932, Case No. 16; *N. and M. Shipoff v. Elite*, Cantonal Court of the Hague (1931), *ibid.*, Case No. 17; *U.S.S.R. v. Onou, K.B.D.* (1925), 69 *Solicitors’ Journal*, 1924-1925, p. 676; *U.S.S.R. v. Belaiew* (1925), 42 T.L.R. 21; *Claim of the Russian Volunteer Fleet*, Br. Admiralty Transport Arb. Bd. (1925), *Annual Digest*, 1925-1926, Case No. 152.

<sup>8</sup> *Annual Digest*, 1941-1942, Case No. 7; *The Times*, May 26, 1939.

was inconclusive, but the point was raised in an interesting fashion. The principle which prevailed was that the Republican Government prior to February, 1939, and the Nationalist Government subsequent to that date were agents of the same entity, Spain, and that the act of the government, an organ of the State and distinct from it, could be *ultra vires* and illegal.

The Supreme Court of Japan, in a case concerning the counterfeiting of Kerensky currency notes, decided that, although without a recognised Government, Russia did not cease to be a State. The counterfeiting was therefore illegal.<sup>9</sup>

[Since the continuity of States is not interrupted by a change of government, the recognition of governments must be considered as an entirely different matter from the recognition of States. Cases often arise, however, in which the distinction is not altogether self-evident. It is sometimes difficult to say whether a given case belongs to the category of a change in the personality of the State or a change of Government. The difficulty may arise in such cases as civil war, temporary anarchy, or some other drastic change in the body politic.] The existence of a civil war invests the revolting community with a certain amount of authority, not dissimilar to State sovereignty. Writers on international law are not agreed whether two separate international personalities have thereby been created.<sup>10</sup> If the struggle is one aiming at secession, then it might turn out that the change is one of statehood, as well as of government.

[In case none of the rival parties is the established government, a state of temporary anarchy would prevail. Does this dissolve the personality of the State?] Hall thinks that the personality of the State survives temporary disruptions provided that they are not unreasonably prolonged.<sup>11</sup> Calvo thinks that the faction which commands the greatest following and comprises the most stable legal elements must be deemed to represent the State.<sup>12</sup> Baty, on the other hand, argues, on the ground of 'no control, no responsibility', that each part of the disrupted State constitutes a separate State. If the lingering hope of one of the parts to

<sup>9</sup> *The Russian Roubles (attempted Counterfeiting) Case*, 1919, *Annual Digest*, 1919-1922, Case No. 15.

<sup>10</sup> See below, p. 303 *et seq.*

<sup>11</sup> Hall, p. 21. Also Borchard, *Unrecognised Governments in American Courts*, 26 A.J.I.L., 1932, p. 261, at p. 267. See above, p. 66.

<sup>12</sup> Calvo, *Droit International*, 1896, vol. I, s. 501.

reunite the whole should be allowed to prevent the break-up of the ancient State, then, he argues with considerable persuasiveness, it would never be possible for any one portion to form itself into a separate State.<sup>13</sup> American courts have held that Santo Domingo in 1818 and Haiti in 1889 were not States because of the existence of civil strife and the disappearance of an orderly government.<sup>14</sup> A foreign State faced with the question of recognition under such circumstances would be at a loss to know whether it is recognising a new Government of the old State or an entirely new State.<sup>15</sup>

The third situation is one in which the territorial domain, or the social and political make-up of a State, has undergone such a fundamental change that it is difficult to discern the former State personality without considerable imagination. Such was the case of Sardinia after having acquired territory several times its own size and having changed its title to the 'Kingdom of Italy'.<sup>16</sup> The Serbian Kingdom became the Kingdom of Yugoslavia after union with the Croatian and Slovene provinces.<sup>17</sup> Examples of the diminution of State territory may be found in the cases of Austria, Hungary and Russia after the War of 1914-1918, [and of India in 1947]. While maintaining that the Italian Kingdom was the continuation of Sardinia, Hall admits that a State ceases to exist by being split into parts 'in such a manner that no part can be looked upon as perpetuating the national being'. The editor of the 8th (1924) edition of his treatise points out that such was the case with Austria after the dismemberment of the Empire.<sup>18</sup>

✓ (It has been contended on behalf of the Soviet Union that a

<sup>13</sup> Baty, *Can an Anarchy be a State?* 28 A.J.I.L., 1934, p. 444. Also Jaffe, *op. cit.*, n. 21, p. 15 above, p. 103.

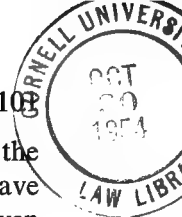
<sup>14</sup> *Gelston v. Hoyt* (1818), 3 Wheat. 246, 324; *The Conserva* (1889), 38 Fed. 431; Moore, *Digest*, vol. I, p. 201.

<sup>15</sup> Jaffe, *op. cit.*, p. 140.

<sup>16</sup> Hall, p. 21, n. 1.

<sup>17</sup> Serbian official opinion was in favour of the theory of continuity (Erich, *loc. cit.*, n. 21, p. 15 above, p. 445). But American official opinion seemed to consider the recognition of Yugoslavia as recognition of a new State (Hackworth, vol. I, pp. 219-21). The German-Yugoslav Mixed Arbitral Tribunal held that the Kingdom of Serbs, Croats and Slovenes was not a 'new State' within the meaning of Article 207 (h) of the Versailles Treaty (*Katz and Klump v. Yugoslavia*, 1925, *Annual Digest*, 1925-1926, Case No. 24; also *ibid.*, p. 34, n.

<sup>18</sup> Hall, p. 22, n. 2. *Accord.*, decision of Austrian Supreme Court in Civil and Administrative Matters, 1925, in *Austrian Pensions (State Succession) Case*, *Annual Digest*, 1925-1926, Case No. 25. See also above, pp. 56-7.



revolution involving a change of the ruling class disrupts the continuity of the State.<sup>19</sup> It is doubtful whether other States have been successfully persuaded to accept this view, or whether even the Soviet Union herself has acted consistently in accordance with this doctrine.<sup>20</sup>

In exceptional cases, despite fundamental changes in the personality of a State, it sometimes happens that no new recognition is regarded as necessary. Thus, the transformation of the United States from a Confederation of States into a Federal State involved a merger of multiple international persons into one, yet the new person was accepted without renewed recognition, and, indeed, it was not even considered necessary to recognise the new government. [Similarly, no new act of recognition was accorded by, for example, the United States, when Eire became the Republic of Ireland in 1949.]

[The practice of States in the matter of recognition often contributes to the confusion created by the obscure nature of the change. Evidently they make little effort to keep the recognition of States and the recognition of governments in watertight compartments. The recognition of a new State is often accomplished by the recognition of its government.] By recognising 'the *de facto* government of the Armenian Republic', the United States had in fact recognised, not only the government, but also the State of Armenia as well.<sup>21</sup> [Similarly, both the United States and Great Britain recognised the State of Israel by affording *de facto* recognition to its Government.] The American declaration was as follows: 'This Government has been informed that a

<sup>19</sup> Dickinson, after examining the Constitution of 1923, expresses doubts whether the Soviet Union is the same entity as the former Russia (*Recent Recognition Cases*, 19 A.J.I.L., 1925, p. 263, at pp. 264-5). *Contra*, Freund, *La Révolution Bolchevique et le Statut Juridique des Russes, la Point de Vue de la Jurisprudence Allemande*, 51 J.D.I., 1924, pp. 51-2.

<sup>20</sup> The Soviet Union did not hesitate to lay claims to any advantages formerly possessed by Czarist Russia. Its doctrine of discontinuity seemed to be confined to matters of national debts (Schlesinger, *Soviet Legal Theory*, 1945, pp. 276-8; Korovin, *La République des Soviets et le Droit International*, 32 R.G.D.I.P., 1925, p. 292; same, *Soviet Treaties and International Law*, 22 A.J.I.L., 1928, p. 753). In a memorial presented to the Genoa Conference, 1922 (*ibid.*, p. 763), the Soviet Delegate's argument for the dissolution of previous obligations seemed to rely upon the doctrine of *rebus sic stantibus*, rather than the discontinuity of the Russian State. [See also Schapiro (*The Soviet Concept of International Law*, 2 *Year Book of World Affairs*, 1948, p. 272), who states: 'The Soviet Government had never denied its succession to the legal personality of the Empire which it overthrew' (pp. 276-9).]

<sup>21</sup> Hackworth, vol. I, p. 222. The Baltic States and the Kingdom of Hejaz and Nejd were also recognised by the United States by the recognition of their governments (*ibid.*, pp. 201, 219).



Jewish state has been proclaimed in Palestine and recognition has been requested by the provisional government thereof. The United States recognises the provisional government as the *de facto* authority of the new State of Israel.’<sup>22</sup> The British statement said simply: ‘His Majesty’s Government in the United Kingdom have decided to accord *de facto* recognition to the Government of Israel.’<sup>23</sup> In the same way, following a resolution adopted by the General Assembly of the United Nations in December, 1948, both Governments granted recognition ‘to the Government of the Republic of Korea’.<sup>24</sup>] In 1919 both the Polish State and its government were recognised by the United States by means of a message to the Polish Prime Minister congratulating him on his assumption of office.<sup>25</sup> In October, 1918, France withdrew her recognition of Finland, but it is not clear whether the withdrawal referred to the State or to the government.<sup>26</sup> In *Neely v. Henkel* (1901), the United States Supreme Court spoke of the recognition of a ‘government’ as ‘the Republic of Cuba’.<sup>27</sup> In *The Penza* and *The Tobolsk* (1921), the court said that ‘the Soviet Republic’ was never recognised by the United States as ‘a sovereign State’.<sup>28</sup> The Preamble of the Treaty of St. Germain declared that the ‘Austro-Hungarian Monarchy’ had ceased to exist, and had been replaced in Austria by a ‘republican government’.<sup>29</sup> According to the Treaty of Trianon, it had been replaced in Hungary by a ‘national Hungarian Government’.<sup>30</sup> It is not quite clear from these phrases whether the replacements of governments resulted in the creation of new States.<sup>31</sup>

✓ [The explanation of this confusion may be found in the fact that, so far as existence is concerned, government and State are inseparable one from the other. This is more obvious in the case of new States. To recognise the one must necessarily involve

<sup>22</sup> [Dept. of State *Bulletin*, vol. 18, No. 464, May 23, 1948, p. 673; see also Brown, *The Recognition of Israel*, 42 A.J.I.L., 1948, p. 620.]

<sup>23</sup> [Foreign Office, Press Release, January 29, 1949.]

<sup>24</sup> [*Ibid.*, January 19, 1949, and *Bulletin*, vol. 20, No. 497, January 9, 1949, p. 60.]

<sup>25</sup> Hackworth, vol. I, p. 217.

<sup>26</sup> Lauterpacht, p. 350, n. 2.

<sup>27</sup> (1901) 180 U.S. 109, 125.

<sup>28</sup> (1921) 277 Fed. 91, 94 (E.D.N.Y.), Hackworth, vol. I, p. 373.

<sup>29</sup> B.F.S.P. 112 (1919), p. 322.

<sup>30</sup> *Ibid.*, 113 (1920), p. 489.

<sup>31</sup> Sir Arnold McNair has adduced, in addition, other proofs from the Peace Treaties to show that Austria and Hungary were new States (*Law of Treaties*, 1938, p. 427). But see above, p. 57, n. 12.

the recognition of the other.<sup>32</sup> The curious case of the recognition by the Allies in 1919 of Albania without recognising its government led to considerable confusion in the First Assembly of the League of Nations.<sup>33</sup> [Similar complexities arose in connexion with the problem of Polish participation in the San Francisco Conference, 1945.<sup>34</sup>] When a new State is recognised, it may generally be presumed that the recognition also applies to the Government.<sup>35</sup>

[The distinction between a change of State and a change of government is important for the clear understanding of the juridical nature of the recognition of governments. First, in the recognition of governments, there is no question of the creation of personality. For the personality belongs to the State and survives the change of government. The constitutive theory has, therefore, no application here.<sup>36</sup> On the other hand, the declaratory theory, which regards recognition as the acceptance of what is in fact existent and treats it as such, is equally applicable to the recognition of both States and governments.] In fact, the traditional recognition policy of the United States, as laid down by Jefferson, has always been applied to both cases.

[Secondly, the distinction makes it possible to define the relations of a State with another whose government it has not recognised. Certain legal relations would be kept alive, while active diplomacy would for the time being have to be discontinued.]

[Thirdly, in matters of succession, the question whether the change is one of statehood or of government has great significance in so far as the rights and obligations to be passed on are concerned.]

[Fourthly, the continued existence of the State renders it the more compelling that the recognition of its government should not be unduly delayed. As the government is the sole organ

<sup>32</sup> Scelle argues on this ground that there should be no distinction between the recognition of States and the recognition of governments. In fact, he contends, there is only one kind of recognition—the recognition of *Compétences Gouvernementales* (op. cit., n. 20, p. 15 above, vol. I, p. 103).

<sup>33</sup> Erich, loc. cit., p. 492; Rougier, *La Première Assemblée de la Société des Nations*, 28 R.G.D.I.P., 1921, p. 197, at p. 236.

<sup>34</sup> [U.N.C.I.O. Documents, vol. 5, pp. 93-7.]

<sup>35</sup> The more comprehensive term 'sovereign' or 'power' has been used in such a case to indicate the object of recognition. See Bankes L.J. in *The Gagara* [1919], P. 95; Hill J. in *The Annette* [1919], P. 105.

<sup>36</sup> See above, p. 14, n. 1. See especially, Oppenheim, vol. I, p. 129.

through which a State expresses its will, the refusal to recognise and to deal with it would deprive the State of the means of exercising its international rights, particularly those requiring positive actions.<sup>37</sup> Thus, in two cases which came before Dutch courts concerning the applicability to Russian nationals of the Hague Convention on Civil Procedure, 1905, the Russian Government being unrecognised by Holland, it was held in one case that the Convention should apply, on the ground of the continued existence of the Russian State.<sup>38</sup> In the other case, it was held that, since the enforcement of the Convention depended upon the continuance of diplomatic intercourse, it could not be applied.<sup>39</sup> It seems that, so far as the exercise of international rights is concerned, a recognised State with an unrecognised government is in no better position than a totally unrecognised State.<sup>40</sup> This fact drives home the idea that recognition, whether of States or of governments, is, fundamentally, the ascertainment of the veritable source of power, that is to say, the location of the governmental competence, within a body politic, and to accord it treatment as such.

<sup>37</sup> Oppenheim, I, 127; also below, pp. 128-9, 140, n. 2.

<sup>38</sup> *Lowinsky v. Receiver in Bankruptcy of the Egyptisch-Turksche Handwerksigarettenfabrik 'Jaka', Ltd.*, 1932, *Annual Digest*, 1931-1932, Case No. 16.

<sup>39</sup> *N. and M. Shipoff v. Elte*, 1931, *ibid.*, Case No. 17.

<sup>40</sup> The consequences of the recognition of governments includes nearly all those of the recognition of States (Oppenheim, vol. I, pp. 132-4).

## CHAPTER 5

### THE DOCTRINE OF LEGITIMACY

[THE doctrine of legitimacy maintains that every government that comes to power in a country depends for its legality, not upon mere *de facto* possession, but upon its compliance with the established legal order of that country. Legality in municipal law determines the legality in international law.] A person or a group of persons claiming to be the government of a particular State in defiance of the internal law of that State is, for that reason, not entitled to international recognition as its lawful government. [Such a doctrine had been consistently held by early writers, including Grotius, and it was not until Vattel that the contrary doctrine of *de factoism* was established.<sup>1</sup> Historically, this doctrine originally took the form of dynastic legitimacy.] Its application in international relations reached the height of its predominance during the period of the French Revolution and its aftermath. On July 6, 1791, the German Emperor invited the principal Powers of Europe to join him in declaring their determination to terminate 'the scandal of a usurpation founded on rebellion'.<sup>2</sup> In a circular, issued on December 8, 1820, to their diplomatic representatives, the Austrian, Prussian and Russian Sovereigns declared: 'The Allied Monarchs being determined not to recognise a Government created by open revolt, could only negotiate with the person of the (Bourbon) King.'<sup>3</sup>

With the fall of Napoleon, Europe fell under the sway of the Holy Alliance. This Concert of Powers soon developed into a super-national league for the suppression of revolutions and the upholding of the principle of monarchical legitimacy.<sup>4</sup> The actions taken by the Holy Alliance practically obliterated the line dividing international affairs and the domestic affairs of a State.

<sup>1</sup> See a historical study of the doctrine in Goebel, *op. cit.*, n. 21, p. 15 above, Ch. I.

<sup>2</sup> Woolsey, *Introduction to the Study of International Law*, 1879, p. 49.

<sup>3</sup> Hertslet, *op. cit.*, n. 49, p. 21 above, vol. I, p. 660.

<sup>4</sup> Woolsey, *op. cit.*, pp. 49-54.

It was more than a question of recognition or non-recognition; it was an imposition of a régime by external force, an intervention in the internal affairs of a State in the most flagrant manner.

The legitimist principle is not confined in its application to the recognition of governments in its simple form. It has also been applied to the recognition of separatist régimes set up by portions of a people against their legitimate sovereigns. This principle was applied by Great Britain towards Spain and Portugal, and formed a great obstacle to British recognition of the Latin American States.<sup>5</sup> In such cases,<sup>6</sup> the recognition of new governments and the recognition of new States are indistinguishable.

The idea of legitimacy is closely linked with the question of premature recognition. The very notion of premature recognition implies a presumption in favour of the claims of the ancient power based upon legitimacy. It is pointed out by Baty, however, that constitutional—and dynastic—legitimacy must be distinguished from what he termed ‘international legitimacy’. In the latter sense, the legitimate right of a government to rule is derived from the fact of its having actually ruled, until the effort to maintain itself had become hopeless.<sup>7</sup> It is in this sense that we speak of premature recognition as a violation of the right of the ‘legitimate’ government.

Except during the period of the French Revolution, British practice has generally been dissociated from the doctrine of constitutional dynastic legitimacy. During the early part of this episode, the British Government continued to communicate with the French Ambassador, Marquis de Chauvelin. It was not until December 27, 1792, when Chauvelin claimed for himself the capacity of Ambassador of the French Republic, that he was

<sup>5</sup> See Anglo-Spanish Treaty of January 14, 1809; Third Additional Article to the Treaty of Madrid, July 5, 1814, signed August 28, 1814 (Smith, vol. I, p. 156. See also above, pp. 84-5). Great Britain had ancient treaties with Portugal under which she was charged with the duty of the general protection of Portugal (Smith, vol. I, p. 191).

<sup>6</sup> Goebel seems to regard the doctrine of legitimacy more as a question of State recognition than as one of the recognition of governments (*op. cit.*, pp. 48-51, 65-6). It is submitted, however, that the question of legitimacy enters into the question of State recognition only in the case of secession, and not in other cases, such as voluntary merger and the inclusion of non-European States into the international community.

<sup>7</sup> Baty, *loc. cit.*, n. 13, p. 100 above, p. 446. See also below, p. 291.

informed that his new capacity could not be recognised.<sup>8</sup> Informal communication with Chauvelin, however, was not completely terminated until the death of Louis XVI.

The French Revolution appears to be the only occasion in modern times in which recognition by Great Britain was based on the doctrine of legitimacy. Even in this case, the application of the doctrine was incomplete. In the Peace of Amiens, the French Republic was recognised, and apparently it was taken for granted that Napoleon was the international representative of the French State.<sup>9</sup>

The delay in the recognition of King Peter of Serbia in 1903 was not in reality a revival of legitimism, although it appeared to be so. The motive behind British policy was not so much the deprecation of the illegal origin of the new monarch, as the indignation and horror against the murder of King Alexander. The British Government, it appears, was quite prepared to resume relations with Serbia, provided the regicide officers were dismissed from the government.<sup>10</sup>

The United States, true to its revolutionary origin, did not subscribe to the legitimism of the Holy Alliance School. But legitimism in a different form soon found its way into American recognition practice. This may be called 'constitutional' or 'republican' legitimism. Secretary Seward, who was reputedly the originator of this doctrine, had, indeed, on several occasions shown reluctance to granting prompt recognition,<sup>11</sup> yet in no case was the doctrine actually invoked. On the contrary, he even expressed the view that a revolution when ripened 'may extinguish a previously existing State, or divide it into one or more independent States'.<sup>12</sup>

The growth of constitutionalism was rapid during the opening

<sup>8</sup> Smith, vol. I, p. 88.

<sup>9</sup> De Martens, R.T. (Cussy), vol. II (1846), p. 271 *et seq.*

<sup>10</sup> Smith, vol. I, pp. 229-33. [See also Schwarzenberger, *Human Rights in British State Practice*, 1 *Current Legal Problems*, 1948, p. 152, at pp. 159-161.]

<sup>11</sup> E.g., Paez Government in Venezuela, 1862, Moore, *Digest*, vol. I, p. 149; Melgarejo Government in Bolivia, 1865, *ibid.*, p. 154; Mosquera Government in Colombia, 1861, *ibid.*, p. 138.

<sup>12</sup> Bernard, *Neutrality of Great Britain During the American Civil War*, 1870, p. 161. See also MacCorkle, who thinks that the Seward policy was not a sharp departure from the traditional policy of *de facto*ism (MacCorkle, *American Policy of Recognition Towards Mexico*, 1933, pp. 19-24). For a general survey of the recognition policy of the United States regarding South America in the nineteenth century, see Graham, *American Diplomacy in the International Community*, 1948.

years of the present century. [In 1907, Dr. Tobar, former Foreign Minister of Ecuador, advanced the doctrine that governments which had risen to power through extra-constitutional means should not be recognised.<sup>13</sup>] The idea was embodied in the Treaty of 1907 between the five Central American Republics.<sup>14</sup> The United States, though not a party, gave it her whole-hearted approval.<sup>15</sup> [It was in full accord with what is known as the 'Wilsonian Policy' of recognition.<sup>16</sup>] In the course of his statement Wilson said:

'Cooperation is possible only when supported at every turn by the orderly processes of just government based upon law, not upon arbitrary or irregular force. . . . Just government rests always upon the consent of the governed. . . . Disorder, personal intrigues and defiance of constitutional rights weaken and discredit government. . . . We can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambition. . . . There can be no lasting or stable peace in such circumstances. As friends, therefore, we shall prefer those who act in the interest of peace and honour, who protect private rights, and respect the restraints of constitutional provision.'

The 'Wilsonian Policy' had special reference to the *coup d'état* of General Huerta in Mexico, February, 1913. The United States denounced the 'usurpation' and made known her intention to discredit and defeat it.<sup>17</sup>

Prior to the Huerta episode, this policy had already been experimented with in Nicaragua in 1912.<sup>18</sup> Later, it was applied against the Dominican Republic in 1913-1916, Ecuador in 1913, and Costa Rica and Cuba in 1917.<sup>19</sup>

In 1923, a new treaty between the original signatories of the 1907 Treaty was concluded. Apart from reiterating the principle

<sup>13</sup> 21 R.G.D.I.P., 1914, pp. 482-6.

<sup>14</sup> Additional Convention to the General Treaty of Peace and Amity, Washington, September 17, 1907, between Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador, Article I: 'The Governments of the High Contracting Parties shall not recognise any other Government which may come into power in any of the five Republics as a consequence of a *coup d'état*, or of a revolution against the recognised Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganised the country' (2 A.J.I.L., 1908, Supplement, p. 229).

<sup>15</sup> Hackworth, vol. I, p. 187.

<sup>16</sup> See President Wilson's statement of March 11, 1913, *ibid.*, p. 181.

<sup>17</sup> *Ibid.*, pp. 181-2. See also MacCorkle, *op. cit.*, pp. 86-91.

<sup>18</sup> Hackworth, vol. I, p. 188.

<sup>19</sup> *Ibid.*, pp. 182-5, 233-7, 240-1.

of the previous treaty, it was further provided that, even if the people had constitutionally reorganised their country, recognition ought not to be accorded if the choice of headship or vice-headship of the State should fall upon persons connected with the *coup d'état* or revolution.<sup>20</sup>

The United States, again, promptly declared its hearty support.<sup>21</sup> The treaty was expressly invoked by the United States with regard to the revolutionary governments in Honduras, 1923,<sup>22</sup> Nicaragua, 1926,<sup>23</sup> Guatemala, 1930<sup>24</sup> and El Salvador, 1931.<sup>25</sup> In Honduras trouble arose immediately after the signing of the treaty. The United States announced in advance that she would not recognise the revolutionary government, if formed, and pronounced by name her choice of the Honduras leaders eligible for the presidency in accordance with Article II of the Treaty.<sup>26</sup>

Constitutionalism in its absolute form, fortunately, was restricted in its application to the Central American Republics.<sup>27</sup> Compared with the Treaty of 1907, the Treaty of 1923 was far more drastic and intolerant. It virtually blocked the way to any extra-constitutional change of government. The recognising State, if powerful enough, might designate whom it considered to be eligible for the headship of the government. Thus, in 1926, after having refused to recognise Chamorro as president of Nicaragua, the United States also rejected Uriza.<sup>28</sup> Her final choice of Diaz was, however, hotly challenged by Mexico, Guatemala and Costa Rica.<sup>29</sup>

A further point of comparison between the two treaties is that, while unconstitutionality of method creates a *prima facie* case

<sup>20</sup> General Treaty of Peace and Amity, February 7, 1923, especially Article II (17 A.J.I.L., 1923, Supplement, pp. 118-9). Salvador made reservations on this article (Woolsey, *The Recognition of the Government of El Salvador*, 28 A.J.I.L., 1934, p. 325, at p. 327).

<sup>21</sup> Hackworth, vol. I, pp. 189-90.

<sup>22</sup> *Ibid.*, p. 254.

<sup>23</sup> *Ibid.*, pp. 265-7.

<sup>24</sup> *Ibid.*, pp. 247-8.

<sup>25</sup> *Ibid.*, pp. 278-9; Woolsey, *loc. cit.*, p. 325 *et seq.*

<sup>26</sup> Dennis, *Revolution, Recognition and Intervention*, 9 *Foreign Affairs*, 1930-1931, p. 204, at p. 211.

<sup>27</sup> Hackworth, vol. I, pp. 190, 248. The Treaty was denounced by El Salvador and Costa Rica (with effect from January 1, 1934), *ibid.*, p. 190.

<sup>28</sup> *Ibid.*, p. 267. See also Woolsey, *The Non-Recognition of the Chamorro Government in Nicaragua*, 20 A.J.I.L., 1926, p. 543.

<sup>29</sup> Dennis, *loc. cit.*, pp. 213-4.



for non-recognition, the Treaty of 1907 permitted the original sin to be redeemed by a constitutional reorganisation by the people. The victorious revolutionary government, if enjoying real popular support, would be able to legalise its position by means of a referendum.<sup>30</sup> On the other hand, while this provision still remained on paper in the Treaty of 1923, it was absolutely deprived of meaning. The leader of the victorious party, whatever support he might command in the country, would be for ever debarred from the headship of the government for the reason that he had the stupidity to belong to a party which happened to be victorious.<sup>31</sup> The consequence would be that after every revolutionary change, the reins of government must be transferred to persons who are wholly unprepared for it, persons who possess neither popular support nor the ambition to govern.

The administration of President Hoover definitely abandoned the test of constitutionality as a prerequisite to the recognition of new governments, except in Central America. Secretary of State Stimson declared on February 6, 1931, that the policy of the Administration was to revert to the declaratory principle of Jefferson.<sup>32</sup>

Legitimism in any form, whether dynastic or constitutional, must have for its justification the discouragement of revolutions and the use of violence, in contrast to the orderly processes of law, as an instrument of politics. Its purpose is to prevent in the intra-national sphere such social and political disorder as is bound to reflect unfavourably in international relations. The excesses and terrors of the French Revolution and the recurrent political upheavals in Latin America,<sup>33</sup> if not the genuine reasons,

<sup>30</sup> [A recent example of this is to be found in the American recognition of the Aphaiwong Government in Siam (United States Information Service, *Daily Wireless Bulletin*, No. 628, March 3, 1948).]

<sup>31</sup> The United States intimated that she would not recognise Chamorro, even if he were elected (Dennis, *loc. cit.*, p. 214).

<sup>32</sup> Hackworth, vol. I, p. 185; Stowell, *The Doctrine of Constitutional Legitimacy*, 25 A.J.I.L., 1931, p. 302. For a review of United States recognition policy in the twentieth century, see Hackworth, *Policy of the United States in Recognising New Governments in the Past Twenty-five Years*, 25 *Proceedings*, 1931, p. 120; Noël-Henry, *Doctrine Américaine en Matière de Reconnaissance des Gouvernements Etrangers*, 35 R.G.D.I.P., 1928, p. 201, at pp. 261-6; McMahon, *Recent Changes in the Recognition Policy of the United States*, 1933.

<sup>33</sup> During 1856 there were five successive revolutionary governments in Mexico in the course of a few months (Moore, *Digest*, vol. I, p. 146). Seward observed that in fifty years there had been about sixty changes of administration in Mexico (Wharton, *Digest*, vol. I, p. 547).

were certainly the immediate causes which drove other nations into adopting a policy of legitimism.<sup>34</sup> Professor Hyde, who seems to be one of the few modern writers defending the legitimist position, observes that, as unpopular governments are likely to be short lived, and, therefore, to inspire rather than to check local disorder which will disturb the tranquillity of foreign relations, it might be advisable for foreign States to delay recognition, thereby giving moral support to the opposition.<sup>35</sup>

Whatever may be said in favour of legitimism along the lines indicated, the doctrine is open to several serious objections.

First, it is an elementary principle of international law that a State should have the right to choose its own rulers, free from external interference.<sup>36</sup> To examine the constitutional legality of the government of another State constitutes an intervention in the domestic affairs of that State.<sup>37</sup> This fundamental principle is embodied in the Atlantic Charter,<sup>38</sup> which was endorsed by the United Nations in their Declaration of January 1, 1942.<sup>39</sup> This principle is so fundamental and so well established that any deviation from it would mean either the end of the independence of the State interfered with, or a grave injury to it justifying the strongest remonstrances. Non-recognition on the ground of illegitimacy of origin is not a postulate of international law.<sup>40</sup>

<sup>34</sup> On the other hand, it is also this frequency which has compelled foreign governments to regard such revolutions lightly, and to turn away from the legitimist doctrine (Smith, vol. 1, p. 260; [and see Dept. of State, Press Release, No. 1020, December 21, 1948]).

<sup>35</sup> Hyde, vol. I (1st ed.), p. 67, (2nd ed.) p. 160. For authorities rejecting the legitimist doctrine see Fauchille, *op. cit.*, n. 24, p. 15 above, t. I, Pt. I, p. 321; Borchard in Wright, *Legal Problems in the Far Eastern Conflict*, 1941, p. 170.

<sup>36</sup> Hall, p. 21; Lorimer, *op. cit.*, n. 19, p. 15 above, vol. I, pp. 231-2; Halleck, *op. cit.*, n. 21, p. 15 above, p. 82; Phillimore, *op. cit.*, n. 21, p. 15 above, vol. I, s. 148; *Dana's Wheaton*, Pt. 2, Ch. 1, s. 12; Grotius, *op. cit.*, n. 2, p. 97 above, Bk. II, Ch. IX, s. 8; G. F. von Martens, *A Compendium of the Law of Nations*, 1802, p. 71; Le Normand, *op. cit.*, n. 1, p. 14 above, pp. 184-5, 267; Vattel, n. 14, p. 14 above, Bk. II, Ch. IV; Rougier, *op. cit.*, n. 2, p. 97 above, p. 483; Oppenheim, vol. I, p. 129; Fauchille, *op. cit.*, t. I, Pt. I, p. 321.

<sup>37</sup> Fauchille, *ibid.*

<sup>38</sup> Paragraph 3 of the Atlantic Charter, signed August 14, 1941, Cmd. 6321 (1941): 'they respect the right of all peoples to choose the form of government under which they will live'.

<sup>39</sup> Cmd. 6388 (1942).

<sup>40</sup> See dictum of Taft, sole arbitrator, in the *Tinoco Arbitration* between Great Britain and Costa Rica, 1923, [1 *Reports of International Arbitral Awards*, p. 369, at p. 381, 'however justified as a national policy non-recognition on such a ground (illegitimacy) may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law']; Holtzendorff, quoted in Le Normand, *op. cit.*, p. 270; Lauterpacht, *Recognition of Governments*, *The Times*, January 6, 1950; Schwarzenberger, letter to *The Times*, January 9, 1950.

Even if it were, it could not be permitted to compete with such a principle as that of independence. A change of government, particularly one achieved through violence, even though it may be fraught with international consequences, is intrinsically a matter solely and exclusively of domestic concern. The legitimist doctrine, in making the legality of the government dependent upon the judgment of foreign States, virtually removes an internal question into the international arena, there to be contested by the *pros* and *cons* of international politics. Whatever the concern other States may have over the choice of the government of a particular State, that choice must, in the last analysis, be left to the people of that State themselves.<sup>41</sup> [This fact was clearly postulated by Ambassador-at-large Jessup on behalf of the United States in connexion with its policy towards China in 1950, although traces of legitimism are apparent in his statement:

‘The United States believes that the people of any country have the fundamental right to determine their own forms of government without foreign dictation. People do have the right to change their form of government but we believe that change must be brought about by the freely expressed will of the people themselves—not by force. We know of no way in which people can determine and establish their own governments except by free and recurring elections in which people vote by secret ballot for their own choices among the several candidates.’<sup>41a</sup>]

Secondly, legitimism is based upon the assumption that a form of government or set of rulers once decided upon ought to be fixed and immutable. Under no circumstances must either be changed unless it is proved to the satisfaction of foreign States that the change is ‘constitutional’ or ‘lawful’. It is to suppose that the first settlement that has been made cannot be improved upon. Such a supposition has absolutely no support in fact. No government on earth today (with the doubtful exception of Japan) can claim that it has descended from an unbroken line of ‘legitimate’ governments. Every government now existing must

<sup>41</sup> Stimson admitted on February 6, 1931, that President Wilson forced Huerta from power ‘against the desire of the authorities and people of Mexico’ (Lippmann and Scroggs, *The United States in World Affairs, 1931, 1932*, p. 334).

<sup>41a</sup> [United States Information Service, *Daily Wireless Bulletin*, No. 1183, January 19, 1950.]

at one time or another have derived its authority through extra-constitutional means. To maintain a principle of legitimacy would mean to contest the right of every existing government to rule.<sup>42</sup> If existing governments, in spite of their 'illegitimacy of origin', are entitled to rule, it cannot with consistency be argued that no future revolution will be tolerated.<sup>43</sup>

Even if it be supposed that stability should have prior consideration to all else, legitimism is not necessarily conducive to that end. Secretary Stimson claimed to the credit of legitimism that, since its adoption, 'not one single revolutionary government has been able to maintain itself' in the five Central American republics.<sup>44</sup> It is doubtful whether the cause of stability might not have been better served had those revolutionary governments been allowed to remain in power without outside pressure. Moreover, the choice of government at a particular time may be erroneous, or the conditions which made the choice felicitous may have fundamentally altered. Under such circumstances, to rule out extra-constitutional changes would be to foster internal oppression, hatred and subversive activities more inimical to international stability than a brisk but decisive revolution. Jefferson, the great revolutionary, once said: 'I hold that a little revolution now and then is a good thing and is as necessary in the political world as storms in the physical. . . . It is a medicine necessary for the sound health of government.'<sup>45</sup>

It is almost impossible for one State to pass judgment upon the constitutionality of the government of another State. The United States has on many occasions taken upon herself the task of the guardianship of the constitution of other States. In 1917 she refused to recognise the Tinoco Government in Costa Rica on the ground of unconstitutionality and declared that such recognition would not be forthcoming 'even if he (*i.e.*, Tinoco) is elected'.<sup>46</sup> She again refused to recognise Tinoco's successor,

<sup>42</sup> See Baty, *op. cit.*, n. 21, p. 15 above, p. 228.

<sup>43</sup> See Dennis, *loc. cit.*, n. 26 above, p. 210.

<sup>44</sup> Anderson, *Our Policy of Non-Recognition in Central America*, 25 A.J.I.L., 1931, p. 298.

<sup>45</sup> Goebel, *op. cit.*, p. 100. Rebellion has been said to be the 'only true guarantee possessed by the people against bad governors' (Hackworth, vol. I, p. 235).

<sup>46</sup> Hackworth, vol. I, p. 234.

and dictated the course which she considered to be in accordance with the Costa Rican constitution.<sup>47</sup>

In 1922, the United States Commissioner in Haiti was instructed to recognise President Borno if he was satisfied with the constitutionality of the election.<sup>48</sup> In 1926, the United States declared that the transfer of power from Chamorro to Uriza in Nicaragua had 'no constitutional basis'.<sup>49</sup> In 1930, after a successful revolution in Guatemala, General Orellana was elected by the Guatemalan Congress as Provisional President. The United States Minister advised the State Department that the appointment was illegal, being contrary to Article 65 of the Constitution.<sup>50</sup> In each of these cases,<sup>51</sup> it may be seen that legal formalities have to a certain extent been complied with by the revolutionary governments. What right, then, have foreign governments to pass judgments on questions of the constitutional laws of another country which baffle even native experts? <sup>52</sup>

Even if such a right could be proved, the task of deciding foreign constitutional questions would prove impossible. The complexities of local politics necessarily make them more than mere questions of law. Foreign observers may often find it impossible even to say whether a particular change of government is one which calls for recognition. Thus, in 1899, President Andrade of Venezuela abruptly left the capital and there were doubts as to the legality of the authority of the vice-president who succeeded him.<sup>53</sup> The United States decided that a case calling for recognition arose when President Alessandri of Chile left the country in 1924, nominally on leave of absence, having turned over the government to General Altamirano.<sup>54</sup> In 1931 after a successful *coup d'état* in Panama the President resigned, and, after a complicated procedure designed to give the change an appearance of constitutionality, a new government took office. Many States, including the United States, accepted the new Government as the constitutional continuation of the old,

<sup>47</sup> Hackworth, vol. I, p. 237.

<sup>48</sup> *Ibid.*, p. 252.

<sup>49</sup> *Ibid.*, 267; above, p. 109.

<sup>50</sup> Hackworth, vol. I, pp. 247-8.

<sup>51</sup> See also the Huerta case, below, p. 115.

<sup>52</sup> Baty, *op. cit.*, p. 204; Moore, *Fifty Years of International Law*, 50 H.L.R., 1937, p. 395, at p. 431.

<sup>53</sup> Moore, *Digest*, vol. I, p. 153.

<sup>54</sup> Hackworth, vol. I, p. 230.

although the whole affair was a transparent disguise.<sup>55</sup> The political change in Albania in 1924 was first regarded by the State Department as a mere change of cabinet in which the question of recognition did not arise. Later, it changed its mind and recognised the new Government.<sup>56</sup> An interesting question was raised when King Constantine of Greece, who had abdicated in 1917, was recalled to the throne in 1920. Did Constantine ever cease to be King? Did his return require a new act of recognition? The Greeks answered in the negative. The United States disagreed, and recognition was withheld indefinitely.<sup>57</sup>

These examples bring to light the practical difficulties in the application of the legitimist doctrine. Even if it be conceded that these difficulties can be overcome, there is still the danger of excessive emphasis being placed upon technical and legalistic considerations rather than upon the broad principles and equitable examinations of what is best for the country concerned.<sup>58</sup>

Further, the doctrine of legitimacy has too often been used as a pretext for political bargaining. The elusiveness of the nature of the problem affords ample room for arbitrary judgment. This circumstance constitutes a powerful weapon in the hands of ambitious foreign States. The Huerta case is particularly instructive. In February, 1913, General Huerta came to power in Mexico after his predecessor had retired under pressure. The American Ambassador reported on February 20 that the Huerta Government was evidently in secure possession, and that it took office 'in accordance with the constitution and precedents'. In its reply on the following day, the State Department said that it was disposed to consider the new Government 'as being legally established'. However, despite this admission of legality, the Department would not accord it recognition until the new Government agreed to settle certain outstanding questions between the two countries.<sup>59</sup> These apparently had nothing whatever to do with the legitimacy of the Government. It appears that although recognition was refused on the ostensible ground of illegitimacy the constitutionality of Huerta's Government did

<sup>55</sup> Hackworth, vol. I, pp. 268-70.

<sup>56</sup> *Ibid.*, pp. 281-3.

<sup>57</sup> *Ibid.*, pp. 286-7.

<sup>58</sup> Woolsey, *loc. cit.*, n. 20 above, at p. 329.

<sup>59</sup> Hackworth, vol. I, pp. 257-9; 7 A.J.I.L., 1913, Supplement, pp. 279-92.

not seem to have been seriously contested. Had Huerta complied with the American demands he would have been recognised, legitimate or illegitimate. The same may be said of the Théodore régime in Haiti, 1914,<sup>60</sup> and the Obregón régime in Mexico, 1921.<sup>61</sup>

[After the Ninth International Conference of American States, Bogotá, 1948, the doctrine of legitimism suffered a serious setback. In Resolution 35 of the Final Act of Bogotá, the American States declared :

‘ That continuity of diplomatic relations among the American States is to be desired.

‘ That the right of maintaining, suspending, or renewing diplomatic relations with another government shall not be exercised as a means of individually obtaining unjustified advantages under international law.

‘ That the establishment or maintenance of diplomatic relations with a government does not imply an opinion on the domestic policy of that government.’<sup>62</sup>

The United States was a party to this Resolution and applied its principle in November, 1948. In October a revolution led by General Odria overthrew President Bustamante of Peru, and installed General Odria in his stead. On November 22, the State Department, referring to Resolution 35 of the Final Act of Bogotá, announced that ‘ the United States will continue normal diplomatic relations with Peru, thus giving recognition to the three weeks old government headed by General Odria ’.<sup>63</sup>

This Resolution is only expressive of the present United States policy towards recognition.<sup>64</sup> Nevertheless, the United States predilection for constitutional legitimacy is well known and not without effect. Thus in the note of September 20, 1949, recognising the government of Hashim Al-Attasi, which had established itself in Syria on August 14, it was pointed out that ‘ the promulgation on September 11, 1949, of a new electoral law reflecting the Syrian Government’s intention to hold elections and form a constitutional government has . . . been noted ’.<sup>65</sup>]

<sup>60</sup> Hackworth, vol. I, pp. 250-1.

<sup>61</sup> *Ibid.*, pp. 261-3.

<sup>62</sup> [Dept. of State, *Press Release*, No. 400, May 21, 1948.]

<sup>63</sup> [Dept. of State, *Wireless Bulletin*, No. 275, November 22, 1948.]

<sup>64</sup> Hyde, vol. I, p. 182. [Cx., United States attitude to Communist China, 1950, above, p. 112, below, pp. 119-20, 124, n. 39.]

<sup>65</sup> United States Information Service, *Daily Wireless Bulletin*, No. 1086, September 21, 1949.

## CHAPTER 6

### THE DECLARATORY OR *DE FACTO* DOCTRINE<sup>1</sup>

THE alternative to the legitimist doctrine is the theory that the existence of a government within a State is a question of fact. The fact that a person or a group of persons governs is the decisive test of the existence of the government and its right to rule. A foreign State, through recognition, acknowledges this fact and treats the government in that capacity.<sup>2</sup> It does not pass judgment upon the form or origin of that government<sup>2a</sup>; nor should considerations of political or economic advantages or questions of ideologies and the like be taken into account. This view is maintained by numerous writers on international law.<sup>3</sup> [Even those who hold the constitutivist view of the recognition of States are obliged to accept the test of *de facto* control for the recognition of governments.<sup>4</sup> Hyde admits that 'in theory, the question involved is merely one of fact', and that, in the long run, a party that has 'firmly established itself in power and thus appears to have gained permanent control' will have to be recognised.<sup>5</sup>]

<sup>1</sup> It is 'declaratory' with regard to the effect of recognition; it is '*de facto*' with regard to the object recognised.

<sup>2</sup> [This principle rejecting the theory of legitimacy and upholding that of *de factoism* was affirmed by the Franco-Chilean Arbitral Tribunal in the *Dreyfus Case* (1901) (Descamps and Renault, *Recueil International des Traités du XXe Siècle*, an 1901, p. 173, at p. 394).]

<sup>2a</sup> [See, for example, Sir Terence Shone, British representative to the Security Council, on recognition of the Communist government in China, *The Times*, December 3, 1949; Secretary of State Acheson concerning the recognition of the Arias government in Panama, United States Information Service, *Daily Wireless Bulletin*, No. 1158, December 15, 1949.]

<sup>3</sup> Baty, *op. cit.*, n. 21, p. 15 above, pp. 204, 208; Scelle, *op. cit.*, n. 20, p. 15 above, vol. I, p. 101; Fauchille, *op. cit.*, n. 24, p. 15 above, T. I, Pt. I, 321; Rougier, *op. cit.*, n. 2, p. 97 above, p. 486. Pinheiro-Ferreira, note in G. F. von Martens, *Précis du Droit des Gens*, 1864, vol. I, p. 224; Goebel, *op. cit.*, n. 21, p. 15 above, p. 66. See also Resolutions of the Institute of International Law, 1936, Article 10 (30 A.J.I.L., 1936, Supplement, p. 186); Project II, Article 8 of the International Commission of Jurists, 1927 (22 *ibid.*, 1928, Special Supplement, p. 241); Resolutions of the International Law Conference of London, 1943 (Bisschop, *London International Law Conference, 1943*, 38 A.J.I.L., 1944, p. 290, at p. 294). E.g., Anzilotti, *op. cit.*, n. 7, p. 14 above, vol. I, p. 258; Oppenheim, vol. I, pp. 127-8; Le Normand, *op. cit.*, n. 2, p. 14 above, p. 268.

<sup>5</sup> Hyde, vol. I (1st ed.), pp. 66-7.



[Professor Lauterpacht has gone so far as to maintain that there is a duty to recognise a government 'provided that the conditions presented by international law are fulfilled'. These conditions are, he says, permanency and effectiveness.<sup>5a</sup> Dr. Schwarzenberger, on the other hand, maintains that the recognition of governments, like that of States, is purely discretionary.<sup>5b</sup> This latter statement is in keeping with Professor Smith's conclusions regarding British practice: 'It is clear that the question of recognition is fundamentally a question of policy rather than a question of law. That is to say, there is no such thing as a "right" to recognition, and every State is entitled to grant or to withhold the recognition, whether of a new State or of a new Government, upon grounds of policy which must necessarily be determined by itself.'<sup>5c</sup>]

States, in their practice, are generally agreed that the declaratory doctrine of recognition is most consistent with justice and common sense. The acceptance of the doctrine, however, did not stop them whenever their self-interest was affected from resorting to various subterfuges in order to evade the full consequences of the doctrine. [British practice has generally followed the *de facto* principle.<sup>6</sup> Canning, when charged by Spain with having abandoned his former legitimist stand, retorted that Britain had never been a supporter of the legitimist view. Britain, he declared, did not hesitate to deal with the Directory of France in 1796 and 1797, with the Consulate in 1801, and with Bonaparte in 1806.<sup>7</sup> This principle was followed in every successive revolution in France.<sup>8</sup> Lord Malmesbury explained to the House of Lords:

'It has been, as your Lordships all know, our usual policy for a period of 22 years—since the Revolution of 1830 in Paris—to acknowledge the constitutional doctrine that the people of every country have the right to choose their own sovereign without any foreign interference; and that a sovereign having been freely

<sup>5a</sup> [Recognition of Governments, *The Times*, January 6, 1950.]

<sup>5b</sup> [Letter to *The Times*, January 9, 1950.]

<sup>5c</sup> [Smith, vol. 1, p. 77. See also Oppenheim, 4th edition by Sir Arnold McNair, vol. 1, pp. 152-53.]

<sup>6</sup> See exceptions, above, pp. 106-7. [See also Lord John Russell's dispatch concerning Mexico, 1861, 52 B.F.S.P., 1861, p. 237, cited in Dr. Schwarzenberger's letter, *loc. cit.*]

<sup>7</sup> Smith, vol. 1, p. 168.

<sup>8</sup> Recognition of Louis Philippe, 1830, *ibid.*, pp. 101, 104-5; of Louis Napoleon, *ibid.*, pp. 107-14; and of the Third Republic, *ibid.*, p. 115.

chosen by them, that sovereign, or ruler, or whatever he may be called, being *de facto* the ruler of that country, should be recognised by the sovereign of this.’<sup>9</sup>

The apparent incongruous British conduct in the case of the revolt of Dom Miguel in Portugal, 1820-1834, must be explained by the fact that, despite the Miguelist control over practically the whole of Portuguese territory, the struggle was not abandoned by their opponents. The decision of the British Government to wait for the outcome of the war was justified by the final collapse of the Miguelist régime in 1834.<sup>10</sup>

During the Spanish revolutions, 1868-1875, British recognition was extended to the successive revolutionary governments.<sup>11</sup> Lord Derby declared in the House of Lords, on March 8, 1875, that recognition had been accorded to any government, ‘which, as a fact, the Spanish people acknowledged and obeyed’.<sup>12</sup> The non-recognition of the Soviet Government in Russia seems to be one of the most flagrant departures from the long-standing *de facto* principle, although it was not precisely on the ground of legitimacy. [Again, in 1949, the British Government departed from the *de facto* principle. At a time when the Chinese Communist authorities were in control of most of China, including all the big cities, Mr. Attlee declared: ‘It is much too early to decide on the question of recognition. We have a very confused situation. . . . It is very previous to judge what the Communist Government will be like. I should judge them by what they do. . . . The question of relations between us and that Government will depend on their actions, and it is premature to judge what lines they will take. . . . I am not prepared to come to a judgment at the moment on the question of recognition.’<sup>13</sup> Six months later, Mr. Bevin made it clear that British policy in this matter was being framed in consultation with ‘Commonwealth and other friendly Governments’.<sup>13a</sup> In January, 1950, however, at a time when the Governments of Australia, Canada and the United States refused to do likewise, the Government of Great Britain, ‘having completed their study of the situation arising from the

<sup>9</sup> Smith, vol. I, p. 114.

<sup>10</sup> *Ibid.*, pp. 170-80. See, however, below, p. 120, n. 17.

<sup>11</sup> *Ibid.*, pp. 197-205.

<sup>12</sup> *Ibid.*, p. 205.

<sup>13</sup> [House of Commons, May 5, 1949, Parl. Debates, vol. 464, col. 1347.]

<sup>13a</sup> [House of Commons, November 16, 1949, Parl. Debates, Vol. 469, col. 2013.]

formation of the Central People's Government of the People's Republic of China, and observing that it is now in effective control of by far the greater part of the territory of China, have this day recognised that Government as the *de jure* Government of China'.<sup>13b</sup>]

[The practice of the United States from the early days of her statehood till the beginning of the present century is marked by adherence to the *de facto* principle.<sup>14</sup>] The rule was laid down in the memorable words of Secretary Jefferson: 'It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared.'<sup>15</sup> The right to choose their own government, he urged, is a right whereon the United States is founded, and must not be denied to other peoples. Whether the choice be a king, convention, association, committee, president, or anything else should make no difference to foreign States so long as it represents the will of the nation.<sup>16</sup>

The course thus set was followed throughout the century.<sup>17</sup> A few quotations will suffice to illustrate the consistency of the practice. Thus, in 1829, Secretary Van Buren declared with

<sup>13b</sup> [The Times, January 7, 1950. See *Civil Air Transport Inc. v. Chennault* (1950), Green, *The Recognition of Communist China*, 3 *International Law Quarterly*, 1950, p. 418.]

<sup>14</sup> For an analysis of American policy concerning the recognition of Governments, see Goebel, *op. cit.*, Ch. IV, VIII; Noël-Henry, *loc. cit.*, n. 32, p. 110 above, p. 245 *et seq.*; also above, p. 110, n. 32.

<sup>15</sup> Note to Gouverneur Morris, American Minister at Paris, March 12, 1793 (Moore, *Digest*, vol. I, p. 120).

<sup>16</sup> *Ibid.*

<sup>17</sup> Numerous official dispatches, in which the *de facto* principle is either applied or reaffirmed, may be found in the *Digests* of Moore and Hackworth (Moore, vol. I, pp. 96, 124, 126, 127, 128, 129, 131, 133, 134, 136, 137, 138, 150 n.f., 153, 155, 156-7, 161, 162, 163; Hackworth, vol. I, pp. 274, 275, 284, 297, 299, 309, 311, 316, 318). During the French Revolution, the United States was the only Power adhering to the *de facto* doctrine. For a time, the American Minister constituted the only member of the diplomatic corps in Paris (Paxson, *op. cit.*, n. 3, p. 79 above, p. 37). With the exception of the case of Spain, the United States even recognised the satellite governments established with the support of Napoleonic arms in other countries (Moore, *International Arbitrations*, vol. V, p. 4577; Moore, *Digest*, vol. I, pp. 128, 132. See, however, below, p. 299, n. 49). The recognition of Dom Miguel in Portugal by the United States was an application of the *de facto* principle, although the result was exactly contrary to the British policy. The difference was not in the principle, but in the appreciation of facts. The United States had mistakenly (judging by the after-events) accepted the Miguelist rule to be definitive (Baty, *op. cit.*, pp. 207, n. 1; 214, n. 1). In such a case, as also in other cases where there are two claimants to power (*e.g.*, the Stadt-holder and States General in the United Provinces in 1785; the Spanish Junta and Joseph Bonaparte in Spain in 1808; Juarez and Miramon in Mexico in the mid-nineteenth century) the question is the subtle one of judging, on the basis of facts, whether the former ruler has been effectively displaced (Baty, *loc. cit.*, n. 13, p. 100 above, pp. 445-51).

reference to the new Government in Colombia: 'So far as we are concerned, that which is the government *de facto* is equally so *de jure*.'<sup>18</sup> President Pierce declared in his message to Congress, May 15, 1856:

'It is the established policy of the United States to recognise all governments, without question of their source or organisation, or of the means by which the governing persons attain their power provided there be a government *de facto* accepted by the people of the country . . . Their determination, whether it be by positive action or by ascertained acquiescence, is to us a sufficient warrant of the legitimacy of the new government.'<sup>19</sup>

In 1900, Acting Secretary of State Hill wrote, with reference to the situation at Bogotá:

'The policy of the United States, announced and practiced upon occasion for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely on its *de facto* ability to hold the reins of administrative power.'<sup>20</sup>

This policy was so closely followed that recognition became almost automatic. In 1848, the United States Minister to France accorded recognition to the Provisional Government of France without waiting for instructions from his government. His action received approbation from President Polk.<sup>21</sup> On many occasions blank forms of credence were sent to legations abroad to be completed by them whenever, in their judgment, a *de facto* government had been established. This procedure was followed even though the new governments were the Empire of Napoleon and the restoration of Louis XVIII.<sup>22</sup> On other occasions, the American diplomatic representatives were delegated with discretionary authority to recognise *de facto* governments.<sup>23, 24</sup>

<sup>18</sup> Moore, *Digest*, vol. I, p. 137.

<sup>19</sup> *Ibid.*, p. 142.

<sup>20</sup> *Ibid.*, p. 139.

<sup>21</sup> *Ibid.*, p. 125.

<sup>22</sup> *Ibid.*, p. 122.

<sup>23</sup> *Ibid.*, pp. 144, 147, 148. In his instruction to McLane in Mexico, Secretary Cass especially pointed out that the discretion given to him to recognise was a discretion to ascertain the state of facts in Mexico (MacCorkle, *op. cit.*, n. 12, p. 107 above, pp. 51-2).

<sup>24</sup> For the acceptance of the declaratory principle in international tribunals, see the *Tinoco Case*, 1923, below, pp. 146, 148; the *Cuculla* and the *McKenny Cases* (1876), below, pp. 147-48; the *Jarvis Case* (1903), Ralston, *Law and Procedure of International Tribunals*, 1926, s. 553.

[The application of the *de facto* doctrine was modified by two developments in the practice of States, notably the United States, which tended to divert the doctrine from its natural course. One is the requirement that, in order for a new government to be recognised, its acceptance by the people should be evidenced by a certain democratic procedure. The other is the requirement that the new government should give proof of its ability and disposition to fulfil the international obligations of the State.]

The authorship of the democratic test has been attributed by some writers<sup>25</sup> to Jefferson, who required that a government in order to be deserving of recognition must be in accord with 'the will of the nation, substantially declared'.<sup>26</sup> To the present writer, it seems that Jefferson had merely laid down a principle, and not prescribed a test. A democratic test would ill accord with his subsequent opinion that kings and conventions are equally entitled to recognition. The republican test seems to have first received concrete formulation in the hands of Seward, who, in an instruction of March 8, 1868, said:

'The policy of the United States is settled upon the principle that revolutions in republican States ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency.'<sup>27</sup>

Thereafter, the test was not only frequently invoked by the United States,<sup>28</sup> [and] was invoked by Ambassador-at-large Jessup in 1950 when explaining United States policy towards China.<sup>28a</sup> It also gained acceptance among European States. Thus, Bismark refused to make peace with the French Government unless it had the authority of a National Assembly.<sup>29</sup>

<sup>25</sup> Baty, *op. cit.*, pp. 215-6.

<sup>26</sup> Note to Gouverneur Morris at Paris, November 7, 1792 (Moore, *Digest*, vol. I, p. 120).

<sup>27</sup> Quoted in Hyde, vol. I, p. 162, n. 8. Previously, although reluctant to recognise revolutionary governments, Seward merely demanded 'conclusive evidence' of *de facto* control, but prescribed no concrete test. See Moore, *Digest*, vol. I, pp. 149, 154. This test is accepted by Rougier, who regards a 'legal' government as one which is ratified by a representative assembly (*op. cit.*, n. 2, p. 97 above, p. 484), and also the London International Law Conference of 1943 (Paragraph 3 of the Resolutions, Bisschop, *loc. cit.*, n. 3, above, p. 294).

<sup>28</sup> Moore, *Digest*, vol. I, pp. 144, 160; Hackworth, vol. I, pp. 225, 292, 293.

<sup>28a</sup> [United States Information Service, *Daily Wireless Bulletin*, No. 1183, January 19, 1950, see p. 112 above.]

<sup>29</sup> Baty, *So-called De Facto Recognition*, 31 Yale L.J., 1922, p. 460, at p. 472, n. 5.

Great Britain, Germany, Austria, Italy and Spain jointly recognised the Republican Government of Portugal in 1911, when the latter was confirmed by a general election.<sup>30</sup> In 1924, the British Minister informed the Greek Government that his Government 'accept the verdict of the plebiscite as representing the wishes of the Greek people, and they formally recognise the régime thus established'.<sup>31</sup> In the Central American Treaty of 1907, as has been pointed out, the doctrine of legitimacy was allowed to be modified by the constitutional reorganisation of the country by the people.

[In 1949 both the United Kingdom and the United States accorded recognition to the Government of Israel after elections had taken place in that country. In both cases, the recognition of the Government was accompanied by recognition of the State.<sup>32</sup> The United Kingdom extended *de facto* recognition without making any reference to the Israeli elections<sup>33</sup>; the United States, however, expressly stated: 'On October 24, 1948, the President stated that when a permanent government was elected in Israel, it would promptly be given *de jure* recognition. The votes have now been counted, and this Government has been officially informed of the results. The United States Government is therefore pleased to extend *de jure* recognition to the Government of Israel.'<sup>34</sup>]

(What is the function of such a test?) It is certainly formidable evidence of the willing approval of the people of the régime in question. But is it necessary that every government should command the voluntary and positive support of the people?<sup>35</sup> (Is not the ability to exact habitual, though not willing, obedience sufficient?) If we demand that the obedience should be voluntary, we must be compelled to deny that any form of government other than a democracy (and what is 'democracy?') is entitled to

<sup>30</sup> Smith, vol. I, p. 259.

<sup>31</sup> *Ibid.*

<sup>32</sup> [See above, pp. 101-102.]

<sup>33</sup> [Foreign Office, *Press Release*, January 29, 1949.]

<sup>34</sup> [State Dept., *Bulletin*, vol. 20, No. 502, February 13, 1949. The recognition took effect as from January 31.]

<sup>35</sup> Answered in the negative in Oppenheim, vol. I, p. 127; Hyde, vol. I (1st ed.), p. 67, n. 1, (2nd ed.), p. 163, n. 9; Hackworth, vol. I, p. 178; Larnaude, *Les Gouvernements de Fait*, 28 R.G.D.I.P., 1921, p. 457, at p. 493; Williams, *La Doctrine de la Reconnaissance en Droit International et ses Développements Récents*, 44 *Hague Recueil*, 1933, p. 203, at p. 249; Lauterpacht, *The Times*, January 6, 1950; Schwarzenberger, *ibid.*, January 9, 1950.

recognition. We would find ourselves in the same error as those who follow the doctrine of legitimism.

Legality, says Le Normand, is the expression of the will of the nation in a determined form. It is not a principle of international law. States attach juridical effects to the will of the nation, not to the form in which that will is expressed.<sup>36</sup> Legitimacy claims to be a right above the will of the nation.<sup>37</sup> If a particular form is prescribed for the expression of the national will, then we are recognising a right above the national will, equivalent to the requirement of legitimacy. Even if it is conceded that a democratic test be desirable, some writers have doubted whether such institutions as popular votes are really capable of reflecting the genuine will of the people, having regard to the fact that voting may be controlled and manipulated.<sup>38</sup>

The requirement of the ability and disposition of a new government to fulfil the international obligations of the State has played an increasingly important rôle in the recognition policy of the United States since the last quarter of the nineteenth century<sup>39</sup> and has received the support of a large number of American jurists.<sup>40</sup> The policy is obviously the reflection of American economic power and investments abroad.<sup>41</sup> Secretary Evarts, however, chose to give it a legal explanation. He said:

<sup>36</sup> Le Normand, *op. cit.*, pp. 270-1. Also, Rougier, *op. cit.*, pp. 485-6.

<sup>37</sup> Le Normand, *op. cit.*, p. 270.

<sup>38</sup> Baty, *op. cit.*, p. 215.

<sup>39</sup> In some instances the new government was required to prove its 'capacity', 'power', 'competence' or 'position' to respect international obligations (Moore, *Digest*, vol. I, pp. 139, 153, 163; Hackworth, vol. I, p. 254). In other cases the 'disposition' to respect international obligations was alone required (Wharton, *Digest*, vol. I, pp. 546, 547; Hackworth, vol. I, pp. 224, 227, 228, 229, 230, 232-3, 247, 249, 271, 276, 296, 308). [The State Department note issued after the establishment of the Communist government in China pointed out 'that the announcement of the inauguration of a Central China Communist régime contains no assurance that this régime is prepared to assume the international obligations which devolve upon a government of China' (United States Information Service, *Daily Wireless Bulletin*, No. 1097, October 4, 1949).]

<sup>40</sup> Article 5 of Project VI of the American Institute of International Law, 1925, 20 A.J.I.L., 1926, Supplement, p. 310; Article 8(2) of Project II of the International Commission of Jurists, Rio de Janeiro, 1927, 22 *ibid.*, 1928, Special Supplement 241. Also Kunz, *The Position of Argentina*, 38 *ibid.*, 1944, p. 436, at p. 437. Goebel thinks that the 'power to carry out international obligations' is the sole basis for the recognition of governments, even to the exclusion of the requirement that 'a greater part of the nation render obedience' (*op. cit.*, p. 66). Fauchille also regards fulfilment of international obligations as a requirement (*op. cit.*, t. I, Pt. I, p. 321).

<sup>41</sup> MacCorkle, *op. cit.*, p. 23.

‘ . . . while the United States regard their international compacts and obligations as entered into with *nations* rather than with political *Governments*, it behooves them to be watchful lest their course toward a Government should affect the relations to the nation. . . . ’<sup>42</sup>

[It is not only the United States that has required an assurance of respect for international obligations before extending recognition to a new government. Thus in 1861 Lord John Russell pointed out that ‘ the instructions addressed to Mr. Mathew, both before and since the final triumph of the Liberal Party, made the recognition by Great Britain of the constitutional Government contingent upon the acknowledgment by that Government of the liability of Mexico for the claims of British subjects, who, either in their persons or their property, for a long series of years can be proved to have suffered wrong at the hands of successive Governments in Mexico ’.<sup>42a</sup> Similarly, in 1949, Dr. Evatt, Australian Minister for External Affairs, declared the Communist government of China could not be recognised ‘ in the absence of specific assurances that the territorial integrity of neighbouring countries, notably Hong Kong, would be respected and that the new China would discharge all international obligations ’.<sup>42b</sup>]

[If it is true that treaties bind the State and are unaffected by changes in government, it must be submitted that to prescribe the ability and disposition to fulfil international obligations as a condition for the recognition of a new government would seem, for that very reason, to be tautologous.) The ability to fulfil international obligations must be considered as implied in the ability to govern. A government which is unable to represent the will of the nation internationally and to compel the enforcement of its international obligations is no government. ✓

[As to the disposition to fulfil international obligations, it is believed that, since the international obligations are the obligations of the State, the new government has no option but to fulfil them. Its disposition or indisposition is irrelevant.) The assurance it may give does not create greater security than the original ✓

<sup>42</sup> Wharton, *Digest*, vol. I, p. 548.

<sup>42a</sup> [Dispatch to Sir C. Wyke, March 30, 1861, 52 B.F.S.P., 1861, p. 237, cited in Dr. Schwarzenberger's letter to *The Times*, January 9, 1950.]

<sup>42b</sup> [*The Times*, October 26, 1949.]



undertakings themselves.<sup>43</sup> The assurance may have the effect of estopping the new government from denying the existence of such obligations; but if the obligations are well founded, they could not be denied in any case.<sup>44</sup> The very fact that an assurance is required might even lead the new government to think that it is not bound by any obligation other than those with regard to which the assurance is given. Fiore has suggested that a new government proclaiming principles subversive to fundamental laws of the international community has no right to be recognised.<sup>45</sup> The same answer that is given to the suggestion that a State may be refused recognition for unwillingness to observe international law may be applied with equal force here,<sup>46</sup> *a fortiori* for the reason that the State itself has already been recognised. It is not a question of refusing recognition, but of bringing the recalcitrant government to account according to international law.<sup>47</sup>

↳ (Despite the theoretical superfluity of this requirement, it has often been used as a pretext for withholding recognition whenever the wish of the recognising State is not fully complied with.) It is no longer a question of the fulfilment of obligations according to international law, but a question of the fulfilment of obligations according to the wish of the recognising State. 'International Obligations' has been interpreted to mean the settlement of border claims, the use of boundary rivers, the improvement of the administration of justice and the agreement to submit certain outstanding disputes to arbitration.<sup>48</sup> It has also been interpreted

<sup>43</sup> [Nevertheless, the United States opposed the application of Albania for admission to the United Nations on the ground that the Albanian Government refused to acknowledge the treaties of its predecessor, Green, *Membership in the United Nations, 2 Current Legal Problems*, 1949, p. 258, at p. 270.]

<sup>44</sup> In recognising the successor to the Tinoco Government in Costa Rica (1917-1919), the British Government did not exact any assurances, but in his arbitral award in the *Tinoco Arbitration*, 1923, Chief Justice Taft held that Costa Rica was nevertheless bound by contracts entered into by the Tinoco Government with British nationals (1 *Reports of International Arbitral Awards*, p. 369 *et seq.*).

<sup>45</sup> Fiore, *op. cit.*, n. 25, p. 15 above, Article 62.

<sup>46</sup> Above, pp. 61-2.

<sup>47</sup> Oppenheim, vol. I, p. 129.

<sup>48</sup> These were some of the demands made by the United States on Mexico as the price for the recognition of the Huerta Government (Hackworth, vol. I, pp. 257-8). See also the recognition of the Diaz Government in Mexico, 1876 (Moore, *Digest*, vol. I, p. 148; MacCorkle, *op. cit.*, pp. 67-81), the Estrada Government in Nicaragua, 1910 (Hackworth, vol. I, p. 264), the Zogu Government in Albania, 1925 (*ibid.*, p. 283).

to mean the consent to conclude a treaty of amity and commerce on terms proposed by the recognising State.<sup>49</sup> With special reference to the recognition of the Soviet Government in Russia, Secretary Hughes said in 1923:

‘These obligations include, among other things, the protection of the persons and property of the citizens of one country lawfully pursuing their business in the territory of the other and abstention from hostile propaganda by one country in the territory of the other.’<sup>50</sup>

[The lack of precision in the meaning of the term ‘international obligations’, coupled with the looseness of manner in which it has been employed, has played into the hands of imperialistic Powers. The fulfilment of international obligations has been made into a condition for recognition, not because it is essential to the existence of the government, but because, by holding out to the new government the coveted prize of recognition, it could be brought into a more receptive mood for otherwise unacceptable demands.] Its retention in the practice of States merely stands as testimony to their unwillingness to give up a convenient instrument of imperialistic policy, which is of doubtful propriety and efficacy.<sup>51</sup>

[In an address before the Council on Foreign Relations in 1931, Secretary Stimson restated the practice of the United States as insistence on the principle of *de factoism* enunciated by Jefferson in 1792:

‘The practice of this country as to the recognition of new governments has been substantially uniform from the days of Secretary of State Jefferson to the days of Secretary of State Bryan in 1913. . . . The general practice, as thus observed, was to base the act of recognition, not upon the constitutional legitimacy of the new government but upon its *de facto* capacity to fulfill its obligations as a member of the family of nations. . . . The present administration has declined to follow the policy of Mr. Wilson and has followed consistently the former practice of the government since the days of Jefferson.’<sup>52</sup>]

<sup>49</sup> The United States recognition of the Obregón Government in Mexico, 1921 (Hackworth, vol. I, pp. 261-3).

<sup>50</sup> *Ibid.*, p. 178. See also *ibid.*, p. 303. For the British attitude, see Smith, vol. I, pp. 239-41, and Lord John Russell’s dispatch of 1861, n. 42a, above.

<sup>51</sup> See Brown, *The Recognition of New Governments*, 26 A.J.I.L., 1932, p. 336, at p. 338.

<sup>52</sup> [Cited in Brown, *loc. cit.*, n. 22, p. 102 above, p. 622.]

The unfortunate consequences of the practice of withholding recognition on grounds other than the absence of *de facto* control have given rise to a doctrine known as the 'Estrada Doctrine'. It is contained in a declaration<sup>53</sup> by the Mexican Foreign Secretary, Senor Don Genara Estrada, in which it was stated that, the granting of recognition being an insulting practice implying judgment upon the internal affairs of foreign States, the Mexican Government would henceforth confine itself to the maintenance or the non-maintenance of diplomatic relations with foreign governments without pronouncing judgment upon the legality of those governments. [A similar sentiment is to be found in Resolution 35 of the Final Act of Bogotá adopted by the Ninth International Conference of American States, 1948, and finds expression in the American announcement concerning the revolutionary administration of General Odria in Peru.<sup>54</sup>]

The doctrine is, in reality, a more extreme form of *de factoism*. In countries where revolutionary changes are endemic and are regarded as equivalent to general elections, the Estrada doctrine is almost a matter of practical necessity.<sup>55</sup>

In principle, in treating whoever in fact exercises the powers of government as the representative of the State, the doctrine is entirely consistent with the declaratory view. But, in practice, it does not yield all the advantages envisaged by its originator. The diplomatic representatives of foreign States would be compelled, unless the revolution succeeded overnight, to choose among rival parties one whom they could deal with as representative of the State.<sup>56</sup> The very fact of making the choice would itself amount to recognition. Thus considered, the Estrada doctrine does not seem to distinguish itself fundamentally from the traditional *de facto* principle.

The answer to the question whether there is a right on the part of the new government to be recognised must be subject to the same considerations as is the question of the recognition of

<sup>53</sup> 25 A.J.I.L., 1931, Supplement, p. 203.

<sup>54</sup> [See above, p. 116.]

<sup>55</sup> British practice in such circumstances has been similar to that envisaged in the Estrada doctrine (Smith, vol. I, p. 260).

<sup>56</sup> Jessup, *The Estrada Doctrine*, 25 A.J.I.L., 1931, p. 719, at p. 722; the same, *A Modern Law of Nations*, 1948, pp. 60-62.

States.) It depends very much upon the sense in which the word 'recognition' is being used. [It may mean the acceptance of the fact of the existence of the new government as the government of the State in question, and/or the expression of the intention to enter into political relations with it. As recognition in the first sense requires no overt act, any act of recognition must be in the second sense and it must consequently be in the nature of a 'free act'.<sup>57</sup>] On the other hand, [once the effectiveness of the new government is established beyond doubt, a foreign State, although free not to enter into political relations with it, cannot, however, ignore its existence or deny its capacity to represent the State without trenching upon the right of the State itself.<sup>58</sup> A State as an international person is entitled to certain inherent rights.<sup>59</sup> It would make nonsense of these rights if a foreign State were permitted to ignore the government which exercises them on behalf of the State. In this sense, recognition is a practical necessity] unless the foreign State can manage to have absolutely nothing to do with the State whose government it does not recognise.<sup>60</sup> Unless this state of aloofness can be achieved, the right to choose its own government and the right of that government to be recognised may be regarded as inherent in the rights of the State as an international person.<sup>61</sup>

[However, in practice, States have not regarded a right to be recognised as among the inherent rights of States, and no such right is included in the Draft Declaration on Rights and Duties

<sup>57</sup> Resolution of the Institute of International Law, 1936, Article 10, 30 A.J.I.L., 1936, Supplement, p. 186; Fiore, *op. cit.*, Articles 59, 60. Cf. above, p. 62.

<sup>58</sup> Le Normand, *op. cit.*, pp. 184-191. This also seems to be the view of the London International Law Conference, 1943, which, while maintaining that foreign States are free 'to defer the resumption of diplomatic relations for political reasons', declares that recognition should 'not be determined on any consideration other than the effectiveness, stability and nature of the power exercised by the government seeking recognition' (Bisschop, *loc. cit.*, note 3, p. 117 above, p. 294).

<sup>59</sup> See Article 8 of the Resolution of the Institute of International Law, 1936 (30 A.J.I.L., 1936, Supplement, p. 186); [see also Article 9 of the Charter of the Organisation of American States, Bogotá, 1948 (Dept. of State, *Bulletin*, vol. 18, p. 666)].

<sup>60</sup> The difficulty of achieving this is made clear by Langer, note 28, p. 60 above, *passim*.

<sup>61</sup> For this view, see Rougier, *op. cit.*, p. 483; Le Normand, *op. cit.*, pp. 184-5; Oppenheim, vol. I, pp. 127-9; Borchard, *The Diplomatic Protection of Citizens Abroad*, 1928, pp. 261, 267; Article 4 of Project VI of the American Institute of International Law, 1925 (20 A.J.I.L., 1926, Supplement, p. 310); also above, p. 104.

of States adopted by the International Law Commission.<sup>62</sup> No State has ever been sued for damages for failure to recognise another's government, and recognising States constantly show that they regard recognition purely as an act of discretion and of policy.<sup>63</sup>]

<sup>62</sup> Report of the First Session, U.N. Doc. A/925, 1949, pp. 8-9.

<sup>63</sup> [See references to Lauterpacht, Schwarzenberger, Smith and Sir Arnold McNair's edition of Oppenheim, n. 5a, 5b, 5c, p. 118 above.]

## PART THREE

### *LEGAL EFFECTS OF RECOGNITION*



## CHAPTER 7

### THE EFFECTS OF RECOGNITION

IN theory, recognition, whether of a State or of a government,<sup>1</sup> is declaratory of the fact of the existence of such a State or government, and cannot, therefore, in itself, be productive of legal effect<sup>2</sup> creative of State personality or governmental capacity. These effects can only be the result of the *existence* of the State or government in question, and not the result of their *recognition*. In practice, however, inasmuch as courts have committed themselves to the doctrine of judicial self-limitation,<sup>3</sup> the test of factual existence has often been eclipsed by the necessity of political acknowledgment. The courts cannot rely upon their own appreciation of facts and treat it as conclusive, until it has been confirmed by the political department. Political recognition thus becomes instrumental in giving rise to legal effects, because it is instrumental in bringing to judicial knowledge the fact of the existence of the State or government in question. It is the purpose of the present inquiry to discover how far the declaratory theory is affected by the doctrine of judicial self-limitation, and whether, even under such a doctrine, the fact of State or government

<sup>1</sup> The effects of the recognition of States and the recognition of governments are similar, except in matters of succession. A new government derives its title in its own right as representative of the State person, whereas a new State derives it through succession. In the present discussion, wherever reference is applicable to both States and governments, the words 'power' or 'régime' will be used. When speaking of 'unrecognised governments', we mean unrecognised general *de facto* governments, as distinguished from local *de facto* governments. For distinction, see below, p. 327. Also, see different meanings of the term '*de facto*', below, p. 270 *et seq.* Here it is necessary to follow the common usage, taking the term '*de facto* Government' to mean either an unconstitutional or an unrecognised government, or both, as the case may be.

<sup>2</sup> It is not denied that recognition produces important political effects and certain legal effects, such as estoppel against subsequent denial of the existence of previously recognised States or governments (see above, p. 78). In the present discussion, this class of legal effect is not under consideration.

<sup>3</sup> Attention is drawn, in particular, to Anglo-American practice. See below, p. 244 *et seq.* For the similar attitude of French courts regarding acts of unrecognised Soviet authorities, see Lagarde, *La Reconnaissance du Gouvernement des Soviets*, 1924, p. 115 *et seq.*



existence may, consistently with the fundamental requirements of justice, be completely, and in the long run, ignored.

An examination of the legal effects of recognition must necessarily involve also an inquiry into the legal effects of non-recognition, for they are two sides of the same problem. If evidence can be adduced to show that States and governments, despite non-recognition, do by their factual existence give rise to legal rights and duties, then it would be proper to conclude that recognition, in itself, is not productive of legal effects.

## CHAPTER 8

### THE RIGHT OF UNRECOGNISED POWERS TO SUE

[To what extent is the right of foreign powers to bring actions in a court of a State dependent upon their recognition by that State? The question was first decided in *City of Berne v. Bank of England* by the English Court of Chancery in 1804.<sup>2</sup> The plaintiff moved for an injunction to restrain the defendant from dealing with certain funds, standing in the name of 'the old Government of *Berne* before the Revolution'. Eldon L.C., refusing to make the order, observed that [it was extremely difficult to say, a judicial Court can take notice of a Government, never authorised by the Government of the Country, in which that Court sits; . . .'.<sup>3</sup>]

For a long time this judgment was accepted by later judges, almost as the last word on the subject. However, doubts have recently been raised as to the conclusiveness of this decision. Firstly, the clarity of this judgment was considerably marred by the judgments of the great Lord Chancellor in two subsequent cases on the same subject. In *Dolder v. Bank of England* (1805),<sup>4</sup> he said, 'Some perplexity arises from what we know and what we can only know judicially. I cannot affect to be ignorant of the fact that the Revolutions in Switzerland have not been recognised by the Government of this country: but as a judge, I cannot take notice of that.'<sup>5</sup> This remark is obviously inconsistent with the earlier case, in which he doubted whether he could take notice of an unrecognised government. Here, he doubted whether he should take notice of the fact that the revolutions had not been

<sup>1</sup> A century and a half ago, it was even doubted whether recognised Sovereigns had the right to sue (Lord Loughborough in *Barclay v. Russell* (1797), 3 Ves. Jun. 423, 430). This doubt has long since been dispelled (Hervey, *The Legal Effects of Recognition in International Law*, 1928, pp. 112-5; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts*, 25 Col. L.R., 1925, p. 544, at p. 549).

<sup>2</sup> (1804), 9 Ves. Jun. 347.

<sup>3</sup> *Ibid.*, 348.

<sup>4</sup> (1805) 10 Ves. Jun. 352.

<sup>5</sup> *Ibid.*, 354. Cf. below, p. 240, n. 91.

recognised. In another case, *Dolder v. Lord Huntingfield* (1805),<sup>6</sup> in answer to the question whether a court of justice may take notice of a new State arising from revolution, Eldon L.C., merely disposed of the question by saying that it was not easy to decide on the meaning of 'revolution'.<sup>7</sup> No mention of *City of Berne v. Bank of England* (1804) was made in either of these two cases. It is difficult to see from them the authority of the earlier case.<sup>8</sup> Secondly, the case was unreasoned and inadequately reported, and it may be doubted whether it deserves the importance attached to it by later decisions.<sup>9</sup>

Several later cases decided in courts of various countries have often been cited as affirming the principle laid down in *City of Berne v. Bank of England*. But the circumstances attending those cases did not really justify such a conclusion. Thus, in the American case, *The Hornet* (1870),<sup>10</sup> the French case, *Matte et Ross v. Société des Forges etc.* (1891),<sup>11</sup> and the English case, *Republic of Chile v. Rothschild* (1891),<sup>12</sup> the *de facto* powers in question were still in the throes of civil war and did not attain the stature of a general government. The denial of their right of action can be fully explained by their lack of independence. After the Congressional Party in Chile actually came into undisputed possession of power in September, 1891, the English court immediately granted the order requested by the agents of the Congressional Party, which had been refused to them in the *Rothschild* case.<sup>13</sup> The decision of the Supreme Court of the United States, in *The Sapphire* (1870) was an obvious departure from the rule. It was held that a suit commenced by a deposed government might be continued by the succeeding unrecognised government in the name of the State.<sup>14</sup> Another American court even allowed an original suit to be brought by an unrecognised

<sup>6</sup> (1805) 11 Ves. Jun. 283.

<sup>7</sup> *Ibid.*, 295.

<sup>8</sup> See Bushe-Fox, *The Court of Chancery and Recognition, 1804-1831*, 12 B.Y.I.L., 1931, p. 63, at p. 66.

<sup>9</sup> Borchard, *Unrecognised Governments in American Courts*, 26 A.J.I.L., 1932, p. 261, at p. 265.

<sup>10</sup> (1870) 2 Abb. 35, Fed. Cases 6705, cited in Jaffe, *op. cit.*, n. 21, p. 15 above, p. 141.

<sup>11</sup> 18 J.D.I., 1891, p. 868, at pp. 881-2.

<sup>12</sup> [1891] W.N. 138; *The Times*, July 4, 1891.

<sup>13</sup> *Republic of Chile v. City Bank* (1891), 91 *Law Times Magazine* 325; *Republic of Chile v. Royal Mail Steam Packet*, *ibid.*, p. 341.

<sup>14</sup> (1870) 11 Wall. 164, 168.

government on the ground that the State itself did not cease to be an international person, the then existing condition of non-recognition being simply an indication that there was no official intercourse between the two States.<sup>15</sup>

More recently, the enthusiasm for the rule of the *City of Berne* case seems to have been revived in American courts, particularly in the cases involving Soviet Russia. In *The Rogdai* (1920) an action *in rem* brought by an agent of the Russian Socialist Federal Soviet Republic for possession of a ship was dismissed on the ground that the United States continued to recognise the defunct provisional government of Russia.<sup>16</sup> The same conclusion was arrived at in *The Penza and The Tobolsk* (1921).<sup>17</sup> In *Republic of China v. Merchants' Fire Assurance Corporation of New York* (1929), the action was dismissed in the lower court on the ground that the Nationalist Government of China was not recognised and had no capacity to sue. Pending appeal to the Circuit Court of Appeals recognition was extended and the judgment was reversed.<sup>18</sup>

In *R.S.F.S.R. v. Cibrario* (1923), the Soviet Government sought to compel an accounting by the defendant who was its buying agent in the United States. The application was refused on the ground that the Russian Socialist Federal Soviet Republic was unrecognised.<sup>19</sup>

The judgment has been criticised on a number of grounds. It has been suggested that, if the claim of the unrecognised government is made in its own right, and not as successor to the

<sup>15</sup> *Government of Mexico v. Fernandez* (1923), cited in Wright, *Suits Brought by Foreign States with Unrecognised Governments*, 17 A.J.I.L., 1923, p. 742, at p. 743 *et seq.*

<sup>16</sup> (1920) 278 Fed. 294, Hudson, p. 91.

<sup>17</sup> (1921) 277 Fed. 91, *Annual Digest*, 1919-1921, Case No. 28.

<sup>18</sup> (1929) 30 F. (2d) 278, *Annual Digest*, 1929-1930, Case No. 21.

<sup>19</sup> (1923) 235 N.Y. 255, 139 N.E. 259, Hudson, p. 114. An attempt to cover the same facts by bringing the action in the names of individuals also failed (*Preobazhenski v. Cibrario* (1922) 192 N.Y. Supp. 275). The view was sustained by the Court of Appeal of Liège in *Despa v. U.R.S.S.* (1931), cited in Harvard Research, *Competence of Courts*, 26 A.J.I.L., 1932, Supplement, p. 505; *Annual Digest*, 1931-1932, Case No. 28. A similar decision was given by the Swedish Supreme Court, upholding the judgment of lower courts in *Soviet Government v. Ericsson* (1921), *Annual Digest*, 1919-1922, Case No. 30. In this case, at the time of the acquisition of the property which was the object of the suit, Sweden was maintaining *de facto* relations with the Soviet Government, and the acquisition was made with the permission of the Swedish Government. But protection of the property was refused on the ground of non-recognition.

previous government, recognition is immaterial.<sup>20</sup> It has also been argued, on equitable grounds, that the property of an unrecognised government ought not to be open to 'free plunder'.<sup>21</sup> The right of action, it is argued, is a corollary to the right of property. If the right to acquire property is admitted, then protection of the acquisition cannot be fairly denied.<sup>22</sup>

*R.S.F.S.R. v. Cibrario* has often been regarded as an affirmation of the principle that, without recognition, an entity has no juridical existence in the eyes of a foreign court. This conclusion is entirely unwarranted. The lower court had, indeed, relied upon the ground that an unrecognised government is juridically non-existent.<sup>23</sup> The New York Court of Appeals evidently chose to base its judgment upon the grounds of comity<sup>24</sup> and public policy.<sup>25</sup> An unrecognised government, not enjoying the comity of the State of the forum, would naturally be barred from seeking relief at its court. By the same token, not only unrecognised powers, but also recognised powers which have severed diplomatic relations, may be denied access to the courts.<sup>26</sup> It thus appears that the *Cibrario* case, far from affirming the contrary view, has clearly shown that the denial of the right of a foreign power to sue does not indicate that in the opinion of the court that power has no juridical existence.<sup>27</sup> In exceptional circumstances, there are even cases like *Government of Mexico v. Fernandez* (1923),<sup>28</sup> in which a right of action was allowed to unrecognised powers. At any rate, the cases reviewed do not conclusively show that the principle of the *City of Berne* case has been strictly followed.

<sup>20</sup> Borchard, *The Validity Abroad of Acts of the Russian Soviet Government*, 31 Yale L.J., 1921-1922, p. 534; also Dickinson, *Unrecognised Government or State in English and American Law*, 22 Mich. L.R., 1923-1924, pp. 29, 118, 122. This view has been abandoned by Borchard in a later article (*Unrecognised Governments in American Courts*, 26 A.J.I.L., 1932, p. 261, at p. 266).

<sup>21</sup> Dickinson, *loc. cit.*, p. 123; Borchard, 26 A.J.I.L., 1932, p. 266.

<sup>22</sup> Doukas, *The Non-Recognition Law of the United States*, 35 Mich. L.R., 1937, p. 1071, at p. 1083.

<sup>23</sup> (1921) 191 N.Y. Supp. 543, 549, 550, cited in Hervey, *op. cit.*, p. 117, n. 20.

<sup>24</sup> Hudson, p. 116.

<sup>25</sup> Quoted in Dickinson, *loc. cit.*, p. 123.

<sup>26</sup> See Harvard Research, *Competence of Courts*, Article 3, 26 A.J.I.L., 1932, Supplement, p. 503.

<sup>27</sup> Fraenkel, *loc. cit.*, p. 551. The contrary view was, however, asserted by Rudkins J., in *Republic of China v. Merchants' Fire Ass. Corp. of N.Y.* (1929) 30 F. (2d) 278, 279, quoted in Dickinson, *Recognition Cases, 1925-1930*, 25 A.J.I.L., 1931, p. 214, at p. 219.

<sup>28</sup> See note 15 above.

Rather, in the *Cibario* case, incapacity to sue has been definitely taken out of the narrow ground of non-recognition.

(While denying the unrecognised government the right to sue, the American courts have often allowed the dispossessed, but still recognised, government to exercise the rights of the State.) Such a solution, although it is the logical consequence of the doctrine of judicial self-limitation, would constitute an exception to the logic of the retroactivity of recognition, which should relate back to the commencement of 'the existence of the new régime'.<sup>29</sup>

<sup>29</sup> Below, p. 184. This practice received the support of Noël-Henry (*Les Gouvernements de Fait Devant le Juge*, 1927, s. 115). See also *U.S. v. National City Bank of N.Y.* (1950), 90 F., Supp. 448.

## CHAPTER 9

### IMMUNITY FROM LEGAL PROCESS

#### § 1. IMMUNITY FROM SUIT

It is a settled principle of Anglo-American law that foreign sovereigns cannot be sued without their consent.<sup>1</sup> How far does this rule apply to unrecognised powers? <sup>2</sup> The early cases do not seem to have covered precisely this point. In the *Santissima Trinidad* (1822),<sup>3</sup> the principle was conceded that an insurgent party recognised as a belligerent could not have its acts reviewed in the courts of another State. If a belligerent community is entitled to such immunity, it is a strong argument for according similar rights to a general unrecognised power. In *Underhill v. Hernandez* (1897),<sup>4</sup> the United States Supreme Court expressly recognised the immunity from suit of an unrecognised power.

In *The Gagara* (1919),<sup>5</sup> the plaintiffs sought the issue of a writ *in rem* against *The Gagara*. The ship was captured from the Bolshevik Government of Russia and condemned as prize of war by the Estonian National Council. The plaintiffs claimed to be the true and lawful owners of the ship. The case involved the twofold question of whether the Estonian National Council enjoyed immunity of property, and whether it had power to transfer title to property. Both questions were answered in the affirmative by the court upon the basis of letters from the Foreign

<sup>1</sup> Hervey, *op. cit.*, n. 1, p. 135 above, p. 126; Fraenkel, *loc. cit.*, n. 1, p. 135 above, p. 552; Noël-Henry, *op. cit.*, n. 29, p. 139 above, ss. 69-70, 135-6; Dickinson, however, believes that the rule is not conclusive (*loc. cit.*, n. 20, p. 138 above, p. 124).

<sup>2</sup> Dickinson thinks that there is a difference between unrecognised States and unrecognised governments, but doubts whether courts could take practical advantage of it (*loc. cit.*, p. 125). This distinction was applied by the Court of Appeal of Amsterdam (*Weber v. U.S.S.R.* (1942), *Annual Digest*, 1919-1942, (Supplementary Volume, Case No. 74) and the Mixed Court of Alexandria (*The National Navigation Co. of Egypt v. Tavoularidis* (1927), *ibid.*, 1927-1928, Case No. 110), in which it was held that the non-recognition of the Russian Government did not affect the immunity of the Russian State.

<sup>3</sup> (1822) 7 Wheat. 283.

<sup>4</sup> (1897) 168 U.S. 250, 252. The opinion on this point was, however, *obiter*, because the act in question was validated by subsequent recognition.

<sup>5</sup> [1919]P. 95.

Office recognising the status of the Estonian National Council as a foreign independent sovereign.

The basis for immunity in *The Gagara* was international comity. This followed from the doctrine laid down in *The Parlement Belge* (1880).<sup>6</sup> Under this theory, an unrecognised power, lacking comity with the State of the forum, would enjoy no exemption. In a more recent American decision, *Wulfsohn v. R.S.F.S.R.* (1923),<sup>7</sup> this theory has been abandoned in favour of a more realistic view. In that case, the question was whether an action could be brought against the unrecognised Soviet Government of Russia for the confiscation of a certain quantity of furs in Russia. The Supreme Court of New York, relying upon the principle of comity, denied immunity to the Soviet Government. The decision was approved in the Appellate Division, but was reversed in the Court of Appeals of New York. It was held that, since the Russian Socialist Federal Soviet Republic was in *de facto* exercise of the exclusive and absolute jurisdiction within its own territory, its immunity from suit was the consequence of its independence. In his judgment, Andrews J. laid down a new principle for immunity:

‘They [our courts] may not bring a foreign sovereign before our bar, *not because of comity, but because he has not submitted himself to our laws.* Without his consent he is not subject to them. Concededly that is so as to a foreign Government that has received recognition. . . . But, whether recognised or not, the evil of such an attempt would be the same. . . . In either case, to do so would “vex the peace of nations”.’<sup>8</sup>

This judgment has met with general approval,<sup>9</sup> and the

<sup>6</sup> (1880) 5 P.D. 197, 207.

<sup>7</sup> (1922) 192 N.Y. Supp. 282, 195 N.Y. Supp. 472, (1923) 234 N.Y. 372, Hudson, p. 112, Green, *International Law Through the Cases*, 1951, No. 35.

<sup>8</sup> 234 N.Y. 372, 375-376. Italics added. Motion for reargument denied ((1923) 235 N.Y. 579). Writ of error dismissed by U.S. Sup. Ct. ((1924) 266 U.S. 580).

<sup>9</sup> Dickinson, *loc. cit.*, p. 128; Borchard, *Unrecognised Governments in American Courts*, 26 A.J.I.L., 1932, p. 261, at p. 265; Hervey, *op. cit.*, p. 131; Harvard Research, *Competence of Courts*, Article 7, 26 A.J.I.L., 1912, Supplement, p. 527. Some writers have criticised the judgment on the ground that the refusal of immunity will strengthen the hands of the government in foreign relations (Noël-Henry, *op. cit.*, s. 119; Hayes, *Private Claims Against Foreign Sovereigns*, 38 H.L.R., 1925, p. 599, at pp. 619-20). For criticism of this view see Jaffe, *op. cit.*, n. 21, p. 15 above, at pp. 157-8.



principle found forceful affirmation in *Nankivel v. Omsk All-Russian Government* (1923).<sup>10</sup>

## § 2. IMMUNITY OF PROPERTY

The immunity of the property of foreign powers from attachment, seizure, arrest or other legal processes is based upon the same considerations as the immunity from suit. But it is quite possible to refuse immunity of property, if the Court acts under the comity theory. The question was raised in *The Annette: The Dora* (1919).<sup>11</sup> Here the plaintiff issued writs *in rem* claiming possession of vessels which had been requisitioned or sequestered by the Provisional Government of Northern Russia, and hired by them to a private firm for the purpose of trade. The Provisional Government moved to set aside the writs on the ground of immunity. The motion was denied on three grounds: that the Provisional Government was not recognised, that the ships were not in actual possession of that Government and that they were not being used for public purposes. The decision in the case was not based upon non-recognition alone. It is extremely doubtful whether it could be maintained that, but for non-recognition, immunity would have been accorded.

In the American case *Banque de France v. Equitable Trust Co.* (1929),<sup>12</sup> the decision was a straightforward affirmation of immunity of property belonging to unrecognised powers. Here, an action to recover a quantity of gold belonging to the unrecognised Union of Soviet Socialist Republics was dismissed upon the authority of *Wulfsohn v. R.S.F.S.R.* (1923).

In the English case *The Arantzazu Mendi* (1939),<sup>13</sup> immunity was granted to a ship in the possession of the Nationalist Government of Spain. At the time of the litigation the Nationalist Government was not yet in sole possession of the Spanish territory. The British Government had recognised it as a government exercising 'de facto administrative control over the larger portion of Spain'. Although there was some sort of 'recognition', it

<sup>10</sup> (1923) 237 N.Y. 150, 142 N.E. 569, *Annual Digest*, 1923-1924, Case No. 70.

<sup>11</sup> [1919] P. 105.

<sup>12</sup> (1929) 33 F (2d) 202, *Annual Digest*, 1929-1930, Case No. 22. See also the Dutch and Egyptian cases above, p. 140, n. 2.

<sup>13</sup> [1939] A.C. 256. See below, p. 320 *et seq.*

does not seem that the recognition amounted to a recognition as *the* government of a State.<sup>14</sup> The House of Lords, nevertheless, proceeded upon the proposition that the Nationalist Government was a 'government' which had been 'recognised'.

Although the decision itself does not clearly support the view that property of unrecognised powers should be immune, Lord Atkin, delivering the opinion of the House, made it plain that the basis of immunity is not comity, but the fact of independence. He said :

'All the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law exist. There is the same necessity for reciprocal rights of immunity, the same feeling of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if government property is seized or injured.'<sup>15</sup>

The decision of the United States Supreme Court in *The Gul Djemal* (1924),<sup>16</sup> may perhaps be cited to contradict this view. A public ship belonging to the Turkish Government, which had severed diplomatic relations with the United States, was denied immunity. This may be urged as a proof that comity is essential for the enjoyment of immunity. Upon examination, however, that does not seem to be the case. The point which seemed to be the primary consideration of the court is that the ship was engaged in ordinary commerce. Moreover, there was no competent person to make the claim for immunity, [although the Spanish Ambassador filed a suggestion with the Court stating that he had charge of Turkish interests in the United States. This suggestion was supplemented by a letter from the Department of State to the Ambassador recognising this state of affairs, but the Court held that the suggestion had to come from the Department of State itself<sup>17</sup>]. The judgment would have been the same even if the existence of comity were not questioned. It appears, therefore, that there is nothing in *The Gul Djemal* which is inconsistent with the principle of the *Wulfsohn* case, [and it should be remembered that in the *Gul Djemal* there was no question of

<sup>14</sup> See below, p. 293.

<sup>15</sup> [1939] A.C. 265.

<sup>16</sup> (1924) 264 U.S. 90.

<sup>17</sup> [Hackworth, vol. 2, p. 442, *et seq.*]

non-recognition, but only of the severance of diplomatic relations].

The granting of immunity to a foreign power on the ground of its independence seems to be the only reasonable approach to the problem. If a foreign power is really independent, the attempt to assert jurisdiction over it would be ineffective. If it be assumed that unrecognised powers have no juridical existence, then there is no party over whom the jurisdiction can be exercised. If, on the other hand, it be assumed that powers, even unrecognised, may have juridical existence, its submission to the jurisdiction would have to be subject to the same principles applicable to recognised powers. It may be admitted that there is some force in the suggestion that jurisdiction may be assumed where the *res* is within the jurisdiction.<sup>18</sup> But that suggestion, if correct, would be equally applicable to the assertion of jurisdiction over recognised powers.

From the above discussion it seems that the relation between recognition and immunity is not one of cause and effect. Many States have accorded jurisdictional immunity to non-sovereign political subdivisions.<sup>19</sup> On the other hand, barring comity, there is nothing to prevent jurisdiction being assumed over recognised foreign sovereigns provided it can be made effective, as, for instance, in the case where the *res* is within the jurisdiction. The right of immunity is inherent, not in the recognition, but in the fact of independence.

<sup>18</sup> Tennant, *Recognition Cases in American Courts*, 1923-1930, 29 Mich. L.R. 1930-1931, p. 708, at p. 714.

<sup>19</sup> Below, p. 253, n. 60.

## CHAPTER 10

### VALIDITY OF LAWS AND ACTS: PUBLIC RIGHTS

THE question of the binding force of acts of an unrecognised State gives rise to little controversy. It is a procedural necessity that in order to claim rights under these acts a foreign State must first have official relations with the unrecognised State. The very act of official intercourse would itself constitute recognition, which would retroactively validate the acts in question.

The unrecognised government of a recognised State presents a different problem. If the unrecognised government acts in the name of the State, enters into contracts, commits torts, grants concessions, relinquishes rights and accepts obligations, how far would the subsequently recognised government be obliged to accept these acts as validly binding the State? The question is answered with great clarity by Professor (Borchard), who says:

‘A general government *de facto*, having completely taken the place of the regularly constituted authorities in the State, binds the nation. So far as its international obligations are concerned, it represents the State.’

Indeed, it is almost superfluous to say that a general *de facto* government of a State is none other than *the* government of that State.

‘It may also be stated, with great confidence’, declared Commissioner Findlay in an arbitration between the United States and Venezuela, ‘that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the State to the same extent and with the same legal effect as what is styled a government *de jure*. Indeed, as Austin has pointed out, every government properly so called, is a government *de facto*.’<sup>2</sup>

<sup>1</sup> Borchard, n. 61, p. 129 above, p. 206. [This statement was expressly adopted by Taft, arbitrator, in the *Tinoco Arbitration* (1923), 1 *Reports of International Arbitral Awards*, p. 369, 378.]

<sup>2</sup> *Day and Garrison (U.S.) v. Venezuela* (1889), U.S.—Ven. Claims Commission, Moore, *International Arbitrations*, vol. IV, p. 3548, at p. 3553.

Similar views have been expressed by Wheaton,<sup>3</sup> Moore<sup>4</sup> and Rivier,<sup>5</sup> who base their arguments on the continuity of the existence and responsibility of the State. It is generally in accord with the practice maintained by the majority of States. Thus, France,<sup>6</sup> the Kingdom of the Two Sicilies<sup>7</sup> and Spain<sup>8</sup> admitted liability for the acts of their Napoleonic rulers. Debts paid by the Prince of Hesse Cassel to Napoleon were held by an international tribunal to be a valid discharge.<sup>9</sup> In 1877, an attempt by the Haitian Government to nullify the acts of the former *de facto* government by means of legislation was vigorously resisted by the United States.<sup>10</sup> Contracts entered into by *de facto* governments have been held to be internationally binding.<sup>11</sup> In *Miller (U.S.) v. Mexico* (1871) an international arbitral tribunal awarded compensation for damages suffered as a result of a forced loan by a *de facto* government.<sup>12</sup> In the *Tinoco Arbitration* (1923), Taft C.J., arbitrator, declared that, notwithstanding non-recognition by Great Britain, the Tinoco Government was 'an actual sovereign government' of Costa Rica, which was responsible for its acts.<sup>13</sup>

Although it may be stated as a general principle that acts of a general *de facto* government are internationally binding on the State, it may still be questionable whether a person or a group of

<sup>3</sup> *Dana's Wheaton*, ss. 31, 32.

<sup>4</sup> Moore, *Digest*, vol. I, p. 249.

<sup>5</sup> Rivier, *op. cit.*, n. 23, p. 15 above, vol. I, p. 62.

<sup>6</sup> Conventions of 1803 and 1831 between France and the United States (Moore, *International Arbitrations*, vol. 5, pp. 4399, 4447). For the American view, see Moore, *Digest*, vol. I, pp. 249-50. For French indemnities to other Powers, see Moore, *International Arbitrations*, vol. 5, p. 4862.

<sup>7</sup> *Ibid.*, p. 4575 *et seq.*

<sup>8</sup> *Ibid.*, p. 4572 *et seq.* Spain and the Two Sicilies accepted liability in spite of the fact that the Napoleonic régimes were in reality foreign invaders. See below, p. 299, n. 49.

<sup>9</sup> Decision of the Holstein University of Kiel. See Phillimore, *op. cit.*, n. 21, p. 15 above, vol. III, pp. 841-849. The French National Assembly, however, refused to regard itself as competent to discharge a debt (Moore, *Digest*, vol. I, p. 120).

<sup>10</sup> Moore, *ibid.*, p. 250.

<sup>11</sup> *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch.D. 489; *same v. Dreyfus Bros. & Co.* (1888), 38 Ch.D. 348. In these cases the '*de facto*' government in question had been recognised by the government of the forum. The headnote in the latter case, however, states: '*semble*, that even in the case of a contract by a foreigner with a rebel State which has not been internationally recognised, property acquired under it cannot be recovered from him in violation of the contract'.

<sup>12</sup> Moore, *International Arbitrations*, vol. 3, p. 2974.

<sup>13</sup> 1 *Reports of International Arbitral Awards*, p. 369, at p. 380.

persons purporting to act as government is really in a position to represent the authority in power and whether his or its acts are in a true sense the expression of the will of the State. Under normal circumstances, both the capacity to represent the State and the procedure by which the will of the State is expressed are provided in the internal public law of that State. An act can be regarded as an act of the State only when the conditions laid down in that internal public law are complied with. On the other hand, [since the term ' *de facto* government ' is used to mean a government which is set up in defiance of the constitutional provisions of the State, to require that its acts, in order to represent the will of the State, must be in conformity with the constitutional provisions is to say that a *de facto* government can under no circumstance engage the responsibility of the State.<sup>14</sup> Many States have attempted to repudiate the acts of their *de facto* governments on this ground.<sup>15</sup>] It has been suggested by a recent writer that [the international transaction thus entered into by a *de facto* government should not be invalidated on the ground of non-compliance with the internal public law of the State, because that internal public law which pre-existed the establishment of the *de facto* government had been by that event destroyed or held in abeyance.<sup>16</sup> If there is an internal public law governing the representative capacity of State agents it must be one based upon the acceptance of the new régime.] [This argument can apply, of course, only to those cases in which the *de facto* government has expressly declared itself to be completely broken away from the pre-existing legal régime. Unless this is so, the mere departure from the established public law does not make an act one of a *de facto* government. It would be nothing more than an act of an individual in the government acting in excess of his authority.]

The best evidence of the *de facto* existence of a government, is, no doubt, provided by its recognition by other States. But even so, it may not be conclusive, at least for an international tribunal. In the *Cuculla Arbitration* (1876) between the United States and Mexico, it was held that the recognition by the United States Minister to Mexico was not sufficient evidence of a

<sup>14</sup> See comments of Taft C.J. in *Tinoco Arbitration*, 1 *Reports of International Arbitral Awards*, p. 369, at p. 381.

<sup>15</sup> See Jones, *Full Powers and Ratification*, 1946, Ch. VI.

<sup>16</sup> *Ibid.*, p. 155, and Taft C.J., *loc. cit.*

*de facto* government. 'Recognition', declared Commissioner Wadsworth, 'is based upon pre-existing fact; does not create the fact. If this does not exist, the recognition is falsified'.<sup>17</sup> This view was similarly held in the *McKenny* case (1876).<sup>18</sup> In both cases, Mexico was consequently absolved from the responsibility for the acts of the alleged *de facto* governments.<sup>19</sup>

These cases have shown that recognition neither proves nor disproves conclusively the *de facto* existence of a government, and therefore does not affect the binding force of the acts of such a government. Let us now consider the converse case of the effect of non-recognition upon such acts. In the *Tinoco* case (1923), it was argued on behalf of Costa Rica that Great Britain, not having recognised the Tinoco Government, was estopped from claiming the responsibility of Costa Rica for the acts of that government. The argument was rejected by Taft C.J., sole arbitrator, who found that the Tinoco Government was at the material time 'in actual and peaceable administration without resistance or conflict or contest by anyone'.<sup>20</sup> Recognition, he said, is weighty evidence of existence. But when recognition is determined by inquiry, 'not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are concerned'.<sup>21</sup> Costa Rica was therefore bound by the acts of the Tinoco Government, notwithstanding its non-recognition by Great Britain.

In negotiating for the settlement of claims between the United States and Mexico, it was argued on behalf of the Mexican Government that Huerta had never constituted even a *de facto* government.<sup>22</sup> But considering the extent, the paramountcy and the duration of his control in Mexico, the argument does not seem to be justified. Many States, including the United States, had refused to recognise this government. President Wilson declared

<sup>17</sup> *Cuculla (U.S.) v. Mexico*, Moore, *International Arbitrations*, vol. 3, p. 2873, at pp. 2876-7.

<sup>18</sup> *McKenny (U.S.) v. Mexico*, *ibid.*, p. 2883.

<sup>19</sup> See also *Georges Pinson Claim* (1928) decided by the Franco-Mexican Mixed Claims Commission, 1928, 39 R.G.D.I.P., 1932, p. 230; Green, *op. cit.*, n. 7, p. 141 above, No. 183.

<sup>20</sup> 1 *Reports of International Arbitral Awards*, p. 369, at p. 379.

<sup>21</sup> *Ibid.*, p. 381.

<sup>22</sup> Feller, *Mexican Claims Commissions, 1923-1934*, s. 150.

that 'he will not recognise as legal or binding anything done by Huerta since he became dictator'.<sup>23</sup> Does this declaration have the effect of liberating Mexico from the ordinary liability for acts of *de facto* governments so far as the United States and its citizens are concerned? It is believed that, following the reasoning of the *Tinoco* arbitration, the answer should be in the negative. It cannot be supposed that should the Huerta Government have declared war on the United States, the United States Government could have considered itself not at war with the State of Mexico.<sup>24</sup>

As regards the competence of *de facto* governments to perform ordinary functions of government, it is believed that whatever is within the competence of a local *de facto* government must be presumed to be within the competence of a general *de facto* government. Thus, the collection of duties, the operation of public services, and other transactions of routine business by the *de facto* government must be considered binding upon the State.<sup>25</sup>

<sup>23</sup> Borchard, *op. cit.*, p. 211, n. 1.

<sup>24</sup> An English Court (K.B.D.) has held that military operations of the British forces against Bolshevist Armies in Russia did not constitute war with Russia (*Eastern Carrying Ins. Co. v. Nat. Benefit Life and Property Ins. Co.* (1919), 35 T.L.R. 292, 294). Note, however, that the Bolsheviks were not then in sole control of the country, and had not been recognised by the British Government, while there had been no executive statement concerning the existence of war.

<sup>25</sup> Below, pp. 315, 324 *et seq.* See also *Hopkins Claim* (1926), *Opinions of Commissioners*, 1927, p. 42; Green, *op. cit.*, No. 144.



## CHAPTER 11

### VALIDITY OF LAWS AND ACTS: PRIVATE RIGHTS

SINCE the fact of the existence of States or governments is not dependent upon its acknowledgment by other States, individuals living under an unrecognised régime cannot escape the consequences of its existence. In their daily course of life legal relations have grown up among them. It is impossible for foreign States to pretend that a State of anarchy has existed within that territory, where, in fact, an orderly process of life has been carried on. It is this aspect of the question which has thrust itself with the greatest force before judges and lawyers. While it might at least be arguable whether the refusal of the right to sue or of the right to immunity, which is immediately connected with the claim to political sovereignty, may not be justified by considerations of self-protection<sup>1</sup> and the attainment of political purposes, such a justification is certainly not available in a case in which private rights alone are concerned.<sup>2</sup> The infliction of pain on individuals serves no purpose, not even a political one. For this reason, the call for *de factoism* in recognition is most pronounced and most urgent in cases where the principal sufferer is the individual.

#### § 1. PERSONAL STATUS OF INDIVIDUALS

The question of nationality often arises as the preliminary question for the decision of rights. Does the possession of nationality depend upon recognition? In *Doe d. Thomas v. Acklam* (1824)<sup>3</sup> the Court of King's Bench held that a British

<sup>1</sup> 'More than once during the last 70 years our relations with one or another existing but unrecognised government have been of so critical a character that to permit it to recover in our courts funds which might strengthen it or which might even be used against our interests would be unwise' (*R.S.F.S.R. v. Cibrario*, 235 N.Y. (1923) 255, 262).

<sup>2</sup> In these latter cases, the question of political sovereignty need not arise at all (Note, *The Effect in American Courts of Acts within the Territory of an Unrecognised Government*, 38 H.L.R., 1924-1925, p. 816).

<sup>3</sup> (1824) 2 B. & C. 779. A similar decision was given by the Supreme Court of the United States, cited, without name, *ibid.*, p. 798.

subject acquired United States nationality in consequence of the Treaty of 1783. In *Murray v. Parkes* (1942),<sup>4</sup> it was held that the secession of Eire not being recognised, the nationality of a British subject was unchanged.

In the United States<sup>5</sup> several cases arose in connexion with the nationality of individuals living in territories which formed parts of the new States emerging from the World War of 1914-1918. A Minnesota Court held that a person residing in that part of Austro-Hungarian territory which was incorporated into Yugoslavia ceased to be an alien enemy from the date of the recognition of Yugoslavia by the United States.<sup>6</sup> Upon similar facts, courts in Pennsylvania and Indiana have, however, held that recognition did not settle the question of the enemy status of persons residing in these territories.<sup>7</sup> A case more directly in point was decided by a French court which held that, the independence of the Ukraine not being recognised by France, the Franco-Russian Treaty of 1896 should be applied to a native of the Ukraine.<sup>8</sup>

Another group of cases arose out of the question whether certification of personal status by officials of unrecognised powers should be considered as valid. In *Golovitschiner v. Dori* (1923),<sup>9</sup> an Egyptian court held that, since Egypt did not recognise the existing government of Russia, the certification of nationality by the former Russian consul (whose government apparently no longer existed) might be entered as evidence, which might be rebuttable. A converse case was decided by a New York court. This time it was a certificate authenticated by an official of the unrecognised Soviet Government which was admitted in evidence. The court said:

<sup>4</sup> [1942] 2 K.B. 123; above, p. 87. [Now, however, see British Nationality Act, 1948 (11 & 12 Geo. 6, Ch. 56), s. 2, and Ireland Act, 1949 (12 & 13 Geo. 6, Ch. 41), s. 3.]

<sup>5</sup> In an early case, *The Nereide* (1815), 9 Cranch 388, 413, it was impliedly held that a native of Buenos Aires, then in rebellion, was a Spanish subject.

<sup>6</sup> *Kolundjija v. Hanna Ore Mining Co.* (1923), 155 Minn. 176, Dickinson, *loc. cit.*, n. 19, p. 101 above, p. 266.

<sup>7</sup> *Garvin v. Diamond Coal and Coke Co.* (1923), 278 Pa. 469; *Inland Steel Co. v. Jelenovic* (1926), 84 Ind. App. 373; Dickinson, *ibid.*, p. 267.

<sup>8</sup> *Tsourkanienko v. Battier*, Trib. Corr. Arras (1923), 50 J.D.I., 1923, p. 833.

<sup>9</sup> Civil Tribunal of Cairo (1923), *Annual Digest*, 1923-1924, Case No. 24. See also *Gross v. Gretchenko*, Mixed Commercial Tribunal of Alexandria (1924), *ibid.*, Case No. 23.

‘It has been judicially determined that there does in fact exist a government, sovereign within its own territory, in Russia. . . . Prior rights and interests have been passed on judicially, during the existence of the present “Soviet Régime”, and our courts have held to the principle that our State Department cannot “determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign, or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question”’.<sup>10</sup>

On October 28, 1921, and October 29, 1924, the Soviet Government issued decrees purporting to deprive Russian emigrés of certain descriptions of their Russian nationality.<sup>11</sup> Prior to its recognition of the Soviet Government, the French Government ignored these decrees and continued to treat the emigrés as Russian nationals in accordance with the old Russian laws.<sup>12</sup> Since the relation between a national and his State is one of allegiance and protection, it is difficult to see the purpose of pretending the existence of a nationality where neither allegiance nor protection could be claimed or was admitted.<sup>12a</sup>

## § 2. STATUS OF CORPORATIONS

As the result of the Soviet decrees nationalising Russian insurance and banking corporations, the status of such corporations became a subject of contention in foreign courts. In American courts the question received the most careful consideration.

The first of these cases is *Sokoloff v. National Bank of New*

<sup>10</sup> *Werenichik v. Ulen Contracting Corporation* (1930), 229 App. Div. 36, 37, 240 N.Y. Supp. 619, 620; *Annual Digest*, 1929-1930, Case No. 19. See Dickinson, *loc. cit.*, n. 27, p. 138 above, p. 234, and Tennant, *loc. cit.*, n. 18, p. 144 above, pp. 733-4. A contrary view was sustained in an earlier case, *Pelzer v. United Dredging Co.* ((1922) 200 App. Div. 646, 193 N.Y. Supp. 676). The status of an administratrix appointed by a Mexican Court was denied recognition, because the Mexican Government was not recognised by the United States. The court did not treat the question as one affecting private rights alone, but considered the position of an administratrix as an official of the Mexican Court. See criticisms in Dickinson, *loc. cit.*, n. 20, p. 138 above, p. 31; Fraenkel, *loc. cit.*, n. 1, p. 135 above, p. 567.

<sup>11</sup> Prudhomme, *La Reconnaissance en France du Gouvernement des Soviets et ses Conséquences Juridiques*, 52 J.D.I., 1925, p. 318 at pp. 323-4.

<sup>12</sup> Policy approved by Noël-Henry (*op. cit.*, n. 29, p. 139 above, s. 122).

<sup>12a</sup> Cf. Lauterpacht, *The Nationality of Denationalised Persons*, 1 *Jewish Year-book of International Law*, 1948, p. 164.

York (1924).<sup>13</sup> The plaintiff deposited with the defendant in New York City, in June, 1917, a sum of money upon the latter's promise to open an account in his Petrograd branch. After the Soviet revolution, the plaintiff's cheques were dishonoured. The plaintiff sued in New York for the balance. The defendant pleaded that, by virtue of the Soviet decrees, the assets and liabilities of the defendant were taken over by the Russian State Bank. It was held by the New York Court of Appeals that the defendant being a corporation formed under United States laws, its corporate life could not be terminated except by United States laws. The decisive question was whether the confiscation of assets by Soviet decrees constituted a valid excuse for default and discharge of the obligation. The answer was that the obligation was a debt, not a bailment, and the plaintiff was entitled to look for satisfaction in other assets of the defendant corporation.

The case did not seem to require any examination into the validity and effect of the Soviet decrees. Justice Cardozo, however, thought it necessary to address himself to this point. In principle, he declared, an unrecognised government is no government at all; in practice, subject to 'self-imposed limitations of common sense and fairness',<sup>14</sup> effect should at times be given to ordinances of unrecognised governments notoriously in *de facto* existence. Such a *de facto* government, he said, 'may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done'.<sup>15</sup> The defendant's case, however, was found to be not within such an exception.

It is thought that this opinion, though *obiter*, provided a point of departure for a more realistic approach to the problem.<sup>16</sup>

In *James v. Second Russian Insurance Co.* (1924),<sup>17</sup> the defendant, a Russian company, pleaded, among other things, that its corporate existence had been terminated by the Soviet decrees.

<sup>13</sup> (1924) 239 N.Y. 158, 145 N.E. 917, *Cases*, p. 157. Comments in Dickinson, *loc. cit.*, n. 19, p. 101 above, pp. 269-70; Tennant, *loc. cit.*, n. 18, p. 144 above, pp. 724-7.

<sup>14</sup> *Cases*, p. 159.

<sup>15</sup> *Ibid.*, p. 160.

<sup>16</sup> Dickinson, *loc. cit.*, n. 27, p. 138 above, p. 237. See criticism in 38 H.L.R., 1924-1925, p. 822.

<sup>17</sup> (1924) 203 N.Y. Supp. 232, 205 N.Y. Supp. 472, (1925) 239 N.Y. 248; 146 N.E. 369, Hudson, p. 124. Comments in Dickinson, *loc. cit.*, n. 13 above, pp. 270-2; Tennant, *loc. cit.*, pp. 727-8; note in 25 Col. L.R., 1925, pp. 668-9.

While following the *Sokoloff* judgment that the recognition of the Soviet decrees was not required by public policy, the New York Court of Appeals proceeded to show that such recognition or non-recognition really made no difference, so long as the defendant corporation had vitality sufficient to answer a complaint.<sup>18</sup>

In this case, again, the court did not base its decision squarely upon the question of the validity of the Soviet decrees. It succeeded, by skilful manœuvres, in basing its decision upon a factor which is irrelevant to the question of recognition.<sup>19</sup> We find this technique again applied, though to a less extent, in *Russian Reinsurance Co. v. Stoddard* (1925).<sup>20</sup>

In this case, the plaintiff, a Russian corporation, brought action for the recovery of certain funds. The plaintiff corporation had been driven out of Russia during the revolution, and the exiled directors met in Paris, purporting to act in their former capacity. The defendant argued that the plaintiff had no existence, that the claimants no longer represented the corporation, and that, in any case, the plaintiff's title was not proved to the exclusion of others.

In the New York Court of Appeals, Justice Lehman, while maintaining that an unrecognised government is no government, said:

'In the present case the primary question presented is not whether the courts of this country will give effect to such decrees but is rather whether within Russia, or elsewhere outside of the United States, they have actually attained such effect as to alter the rights and obligations of the parties in a manner we may not in justice disregard, regardless of whether or not they emanate from a lawfully-established authority.'<sup>21</sup>

It was found as a fact that the Russian Socialist Federal Soviet Republic actually governed in Russia. Such a fact, observed Justice Lehman,

<sup>18</sup> As to a second defence, that the liabilities of the defendant had been extinguished by the decrees, it was held that the Soviet decrees could not affect assets abroad (Hudson, p. 127; [see also *A/S Merilaid & Co. v. Chase Nat. Bank of City of N.Y.* (1947), 71 N.Y.S. (2d) 377].

<sup>19</sup> This is likened to a judicial technique in deferring constitutional questions (Note in 38 H.L.R., 1924-1925, pp. 822-3).

<sup>20</sup> (1925) 240 N.Y. 149, 147 N.E. 703, *Cases*, p. 162. Comments in Dickinson, *loc. cit.*, n. 13, p. 753; *loc. cit.*, n. 16, pp. 230-1; Tennant, *loc. cit.*, pp. 729-30; Notes in H.L.R. XXXIX, 127.

<sup>21</sup> *Cases*, p. 164.

'must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundations; but lawful or unlawful, its existence is a fact and that fact cannot be destroyed by juridical concepts. . . . In such case we deal with result rather than cause. We do not pass upon what such an unrecognised governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of that which has been done, primarily from the point of view of fact rather than of theory.'<sup>22</sup>

The court gave judgment for the defendant, not only upon the ground of the 'inverse of the exception of public policy' as formulated in the *Sokoloff* case, but also upon the grounds of the danger of double recovery and the inadequate safeguard to the interests of shareholders. It is probable that the danger of double recovery was actually the principal consideration of the court. This was evidenced by the fact that in a similar case where there was no danger of double recovery, the court reached a contrary conclusion, upholding the continued existence of the nationalised Russian corporation.<sup>23</sup>

In *Joint Stock Co. of Volgakama Oil and Chemical Factory v. National City Bank* (1925),<sup>24</sup> since the deposit of money was made subsequent to the nationalisation decree, it was held that the defendant was estopped from contending the non-existence of the plaintiff's corporate entity. However, the court did not disregard the Soviet decrees altogether, but proceeded to examine the later Soviet decrees on their merits and held that there was nothing in them that purported to terminate the plaintiff's corporate existence.

In *James & Co. v. Rossia Insurance Co.* (1928), the continued existence of the Russian Corporation was upheld on the ground of equity.<sup>25</sup> The effect of the Soviet laws was, however, again denied in *Petrogradsky M.K. Bank v. National City Bank* (1930).<sup>26</sup>

<sup>22</sup> *Cases*, pp. 165-6; 240 N.Y. (1925) 149, 158.

<sup>23</sup> *First Russian Insurance Co. v. Beha* (1925), 240 N.Y. 601, see Dickinson, *loc. cit.*, n. 16, p. 231; Tennant, *loc. cit.*, p. 730.

<sup>24</sup> (1925) 240 N.Y. 368, Tennant, *ibid.*, p. 730; Dickinson, *loc. cit.*, p. 230.

<sup>25</sup> (1928) 247 N.Y. 262, Dickinson, *ibid.*, pp. 231-2.

<sup>26</sup> (1930) 253 N.Y. 23, 170 N.E. 479, *Annual Digest*, 1929-1930, Case No. 20. Comments in Dickinson, *loc. cit.*, pp. 232-3; Tennant, *loc. cit.*, pp. 731-4. Rehearing denied (254 N.Y. 563); *certiorari* denied by U.S. Sup. Ct. (282 U.S. 878).

The circumstances in this case were similar to those in the *Stoddard* case. The decision of the lower court based upon the authority of the *Stoddard* case was, however, reversed by the Court of Appeals of New York. It was held that the corporate existence of the plaintiff was unaffected by the Soviet laws, which were mere 'exhibitions of power'. Although there was no harm in upholding everyday transactions of business, American Courts, it was held, must not assist in divesting the plaintiff of title to any asset which would ultimately be transferred to the unrecognised government. For this reason, the dissolution of the corporation was invalid and the old Imperial Russian law had to be regarded as governing the juridical status of the company. The authority of the former directors was regarded as sufficient to permit them to sue in the name of the corporation.

The *Petrogradsky* judgment was brought into juxtaposition with the *Stoddard* judgment in *People ex rel. Beha, Northern Insurance Co.* (1930).<sup>27</sup> The New York Superintendent of Insurance applied for an order to take possession of the property and conserve the assets of Russian insurance companies in liquidation. The Superintendent relied upon the *Stoddard* case, the company directors upon the *Petrogradsky* case. The order was granted by the New York Supreme Court but was reversed by the Court of Appeals on the ground that the Russian directors must work out for themselves their problems of internal management.<sup>28</sup>

The cases reviewed above illustrate the unwillingness of American courts to give effect to Soviet decrees purporting to terminate the corporate existence of Russian companies. The principles of the *Sokoloff* and *Stoddard* judgments were given very little encouragement, and have been restricted to very narrow limits. It was not until the pronouncement of the decision in *Salimoff and Co. v. Standard Oil Co. of New York* (1933),<sup>29</sup> that a real change of attitude toward Soviet decrees took place. So far as concerned the effect of the laws of unrecognised powers upon the existence of their corporations, the principle of the *Salimoff* decision was followed in subsequent cases of non-recognition. Thus, in *The Denny* (1941),<sup>30</sup> two Lithuanian

<sup>27</sup> (1930) 243 N.Y.S. 35, 229 App. Div. 637, cited in Dickinson, *loc. cit.*, pp. 233-4; Tennant, *loc. cit.*, p. 733, n. 86.

<sup>28</sup> See Jaffe, *op. cit.*, n. 21, p. 15 above, p. 188.

<sup>29</sup> 262 N.Y. 220, 186 N.E. 679, below, p. 159.

<sup>30</sup> (1941) 40 F. Supp. 92; 127 F. (2d) 404, *Annual Digest*, 1941-1942, Case No. 18.

Corporations brought a possessory libel against a Lithuanian ship. The United States Government had refused to recognise both the Lithuanian Soviet Socialist Republic and its absorption into the Union of Soviet Socialist Republics in 1940. The District Court of New Jersey held that the libellants, having been dissolved by the laws of the Lithuanian Soviet Socialist Republic, had lost their juridical existence and had no right to sue. The powers of attorney given by the libellants were consequently void. In the Circuit Court of Appeals, Third Circuit, the judgment was reversed. The court, however, not only did not overrule the holding of the lower court that the Soviet nationalisation decree should be upheld, but went further and declared that both the reorganisation of the libellant corporations and the conferment of the powers of attorney under the Soviet laws were valid. Citing the *Salimoff* decision, the court said:

‘We may not ignore the fact that the Socialist Soviet government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled there.’<sup>31</sup>

[In *A/S Merilaid and Co. v. Chase National Bank of City of New York* (1947),<sup>32</sup> the Supreme Court of New York County had to consider the effect of a nationalisation decree by the Estonian Soviet Socialist Republic, after the absorption of Estonia into the Soviet Union. In its judgment the Court pointed out:

‘The Government of the United States does not recognise the incorporation of the Republic of Estonia into the Union of Soviet Socialist Republics, and it has refused to recognise the Estonian Soviet Socialist Republic. The legality of the nationalisation laws and decrees or of any of the acts of the régime now functioning in Estonia is not recognised by the Government of the United States.’]

### § 3. PROPERTY

(There are two aspects of the question of the validity of acts of unrecognised powers with regard to property: the validity of the transfer of titles to property between private individuals

<sup>31</sup> 127 F. (2d) 404, 410.

<sup>32</sup> [(1947) 71 N.Y.S. (2d) 377.]



under the sanction of the laws of unrecognised powers, and the transfer of title by means of confiscatory laws. The latter usually meets with greater opposition in foreign courts.)

In two early English cases the legislation of the revolting American States was regarded as the law of independent States. In *Wright v. Nutt* (1788), confiscation of property by a Georgian act was considered as a good defence in a suit brought in England by an American creditor.<sup>33</sup> In *Folliott v. Ogden* (1789), a confiscatory act of the State of New Jersey was treated as a law of an independent State, although, owing to its penal character, it did not constitute a bar to action.<sup>34</sup> These two cases being decided after the conclusion of the Treaty of 1783, it is not clear whether the decision was based upon the retroactive effect of the recognition.<sup>35</sup>

In *Ogden v. Folliott* (1790), although the judgment of *Folliott v. Ogden* was affirmed, the Court of King's Bench, however, expressly rejected the view that the confiscation by New Jersey was valid, saying that the act was 'illegal at that time, whatever confirmation it might afterwards receive there by the subsequent treaty of peace'.<sup>36</sup> The refusal to regard acts of unrecognised governments as law, even after recognition, was again confirmed in *Dudley v. Folliott* (1790).<sup>37</sup> It was held that the seizure by the State of New Jersey was an unlawful act, not covered by the covenant in a conveyance of lands which guaranteed against lawful interruption. In *Barclay v. Russell* (1797),<sup>38</sup> confiscation by the State of Maryland was held to have no effect on property in England. The judgment, however, seemed to be based more upon the territorial character of the act, than the fact of non-recognition.

In *Dolder v. Lord Huntingfield* (1805),<sup>39</sup> the Helvetic Republic sought to recover a certain fund belonging to former Swiss Cantons but declared national property by an act of the Republic. The defendant's objection that the Republic had not been recognised was overruled by the court.

<sup>33</sup> (1788) 1 H.Bl. 136, 149.

<sup>34</sup> (1789) 1 H.Bl. 123, 135

<sup>35</sup> Below, p. 172.

<sup>36</sup> (1790) 3 Term Rep. 726, 732. Affirmed by the High Ct. of Parliament (1792), 4 Bro. Parl. Cas. 111.

<sup>37</sup> (1790) 3 Term Rep. 584.

<sup>38</sup> (1797) 3 Ves. Jun. 423.

<sup>39</sup> (1805) 11 Ves. Jun. 283.

In *The Lomonosoff* (1921),<sup>40</sup> salvage was awarded for rescuing a ship from 'Bolsheviks' at Murmansk, where there was 'no established government at all'. But in *A. Gagnière & Co. v. Eastern Co. of Warehouses, etc., Ltd.* (1921),<sup>41</sup> it was held that seizure by the Soviet officials was an act of government, and not an act of 'civil commotion'. In these cases, it seems that the realities of the situation have been taken into account.

In the celebrated case of *Luther v. Sagor* (1921),<sup>42</sup> the court reverted to the view of denying the validity of the confiscatory laws of unrecognised powers. This was an action for the recovery of a quantity of plywood confiscated in Russia by the then unrecognised Soviet Government and subsequently sold to the defendant. Roche J., giving judgment for the plaintiff, said:

'... I am not satisfied that His Majesty's Government has recognised the Soviet Government as the Government of a Russian Federative (*sic*) Republic or of any sovereign State or power. I therefore am unable to recognise it, or to hold it has sovereignty, or is able by decree to deprive the plaintiff company of its property.'<sup>43</sup>

The United States courts, in dealing with Civil War cases, have recognised certain effects of acts and laws of the Confederacy affecting titles to property within its jurisdiction.<sup>44</sup> In the Soviet cases, the courts have been careful to distinguish between properties within the Russian territory and those without. The transfers of titles to property in Russia under Soviet laws were generally upheld.<sup>45</sup>

The most important American case on this subject is *Salimoff and Co. v. Standard Oil Co. of New York* (1933).<sup>46</sup> The plaintiff

<sup>40</sup> [1921] P. 97.

<sup>41</sup> *The Times*, April 30, 1921.

<sup>42</sup> [1921] 1 K.B. 456, reversed on further facts, 3 K.B. 532. See comments in Borchard, *loc. cit.*, n. 20, p. 138 above, p. 82. See similar decision by the Tribunal de la Seine (1923), 51 J.D.I., 1924, p. 26. Approved by Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 126. For further comments see Lipstern, *Recognition and the Application of Foreign Law*, 35 *Grotius Transactions*, 1949.

<sup>43</sup> [1921] 1 K.B. 477.

<sup>44</sup> Below, p. 309 *et seq.*

<sup>45</sup> See Andrews J., in *Wulfsohn v. R.S.F.S.R.* (Hudson, p. 113; Green, *op. cit.*, n. 7, p. 141 above, No. 35); *James v. Second Russian Ins. Co.* (239 N.Y. (1925) 248; Hudson, p. 127). But see Cardozo J., in *Sokoloff v. National Bank of New York*, in which he said that the confiscation by an unrecognised government was no more than 'seizure by bandits or by other lawless bodies' (*Cases*, p. 159).

<sup>46</sup> (1933) 262 N.Y. 220, 186 N.E. 679, Hudson, p. 135.

sued for ownership of some oil extracted from lands in Russia, which had been confiscated by the Soviet Government. He based his case upon the authorities of *Luther v. Sagor* and the *Sokoloff* case. Pound C.J., delivering the opinion of the New York Court of Appeals, said that although no full effect could be given to acts of *de facto* governments they should not be ignored.

‘The question with us’, he said, ‘is whether, within Russia, the Soviet decrees have actually attained such effect as to alter the rights and obligations of parties in a manner we may not in justice disregard, even though they do not emanate from a lawfully established authority, recognised politically by the government of the United States.’<sup>47</sup>

The Soviet Government was found to be in fact in existence. The United States Government admitted that it had functioned as a *de facto* or *quasi* government since 1917. It was refused political recognition ‘as one might refuse to recognise an objectionable relative, although his actual existence could not be denied’.<sup>48</sup> The learned Chief Justice concluded: ‘The confiscation is none the less effective. The government may be objectionable in a political sense. It is not unrecognisable as a real governmental power which can give title to property within its limits.’<sup>49</sup>

What seemed to be a settled rule as laid down in the *Salimoff* case was again placed in doubt in the cases arising out of the non-recognition by the United States of the absorption of the Baltic Republics by the Soviet Union. Several actions were brought in American courts for possession of ships belonging to nationals of these Republics, and which had been confiscated by Soviet decrees. The libellants were original owners who were acting at the behest of the Soviet authorities. In *The Kotkas* (1940),<sup>50</sup> and *The Regent* (1940),<sup>51</sup> the New York Court dismissed the libel on curiously conflicting grounds: that the Soviet decrees had deprived the owners of power to institute such an action; and that the United States did not recognise the validity of the Soviet decrees in the Baltic States. In *The Signe* (1941),<sup>52</sup> a Louisiana

<sup>47</sup> 262 N.Y. (1930) 220, 224; Hudson, p. 136.

<sup>48</sup> *Ibid.*, p. 137.

<sup>49</sup> *Ibid.*

<sup>50</sup> (1940) 35 F. Supp. 983, *Annual Digest*, 1941-1942, Case No. 15.

<sup>51</sup> (1940) 35 F. Supp. 985, *ibid.*, Case No. 15, note.

<sup>52</sup> (1941) 37 F. Supp. 819, *Annual Digest*, 1941-1942, Case No. 16.

Court held that the Consul-General of the former Estonian Republic had the right to act as trustee under the Estonian laws. In a later stage of litigation, the Estonian territory was overrun by German forces. The state of affairs lost all semblance of stability, and the authority of the Estonian Consul-General was recognised pending the development of future events.<sup>53</sup> In *The Denny* (1941),<sup>54</sup> however, both the District Court of New Jersey and the Circuit Court of Appeals, Third Circuit, were agreed that, following the *Salimoff* judgment, the effects of Soviet laws upon persons and property within its jurisdiction must be recognised.

The more recent case of *The Maret* (1946),<sup>55</sup> seems to be a very strong case for the reversion to the traditional doctrine of non-recognition. Here the United States Court of Appeals, Third Circuit, refused to recognise the ownership of the Soviet Union over a nationalised Estonian ship and allowed the Estonian Consul-General to act for the co-owners of the ship, expressly rejecting the views of Dickinson and Borchard and the principles of the *Sokoloff* and *Stoddard* decisions. [In *Latvian State Cargo and Passenger S.S. Line v. Clark* (1948) the United States District Court, District of Columbia, refused to award to the plaintiff company, in whom the Latvian Soviet Government had vested the title in three nationalised ships, the insurance paid in respect of the vessels after they had been sunk. The Court remarked:

‘A court may not give effect to an act of an unrecognised government, for by doing so it would tacitly recognise the government, invade the domain of the political department, and weaken its position.’<sup>56</sup>]

<sup>53</sup> *The Signe* (renamed *Florida*) (1943), 39 F. Supp. 810, 133 F. (2d) 719, *Annual Digest*, 1941-1942, Case No. 19. Similarly, *Buxhoeveden v. Estonian State Bank* (1943) 41 N.Y.S. (2d) 752, 181 Misc. 155; with regard to Latvia, *In re Graud's Estate* (1943) 41 N.Y.S. (2d) 263, 45 N.Y.S. (2d) 318, cited in Lauterpacht, p. 432, n. 2

<sup>54</sup> (1941) 40 F. Supp. 92, (1942) 127 F. (2d) 404, *Annual Digest*, 1941-1942, Case No. 18; cf. above, p. 156.

<sup>55</sup> (1946) 145 F. (2d) 431, cited in Langer, *op. cit.*, n. 28, p. 60 above, pp. 267-8. See similar decisions in Irish Courts, *The Ramava* (1941), High Ct. of Eire, 75 *Irish Law Times* 153, *Annual Digest*, 1941-1942, Case No. 20 (reported as *Zarine v. Owners, etc.* (1941), 36 A.J.I.L., 1942, p. 490). French Courts (in *Jellinek v. Levy* (1940), *Annual Digest*, 1919-1942 (Supplementary Volume), Case No. 12; *X. v. Levit & Walter* (1939), *ibid.*, Case No. 13), and a Swiss Court (in *Maison de Banque v. Thorsch* (1938), *ibid.*, p. 25, n.) have recently refused to recognise German confiscatory laws in Czechoslovakia and Austria, respectively, on the ground of public policy.

<sup>56</sup> [(1948) 80 F. Supp. 683; 43 A.J.I.L., 1949, p. 380.]

As the absorption of the Baltic States by the Soviet Union was regarded by the United States as contrary to international law, it is not certain whether the rigidity of the principle of non-recognition would be equally applied to cases of secession or internal changes of government.

#### § 4. MARRIAGE AND DIVORCE

To make the validity of marriage and divorce depend upon the political recognition of governments would certainly result in the most astounding absurdities. It is most astounding because it would affect most profoundly the human relations involved. Married couples would become promiscuous; children bastardised; and remarried divorcees bigamous, because some foreign State failed to recognise the government of the country in which the marriage was solemnised or in which the divorce was granted. An individual might be married or unmarried, bigamous or not bigamous, legitimate or illegitimate, according to the country he was in at the time.

There is no reported case on this subject in Anglo-American courts. A dictum in *Banque de France v. Equitable Trust Co.* (1929),<sup>57</sup> that a marriage valid where celebrated is universally valid, seems to express the correct rule. However, the contrary doctrine seems to have been adopted by several continental courts. In *Chiger v. Chiger* (1926), a petition by Russian nationals for divorce on grounds recognised by Soviet law failed because the Soviet Government was not recognised in France.<sup>58</sup> A marriage<sup>59</sup> and a divorce<sup>60</sup> satisfying the requirements of both the Kerensky and the Soviet laws were declared null and void by a Hungarian

<sup>57</sup> (1929) 33 F. (2d) 202, *Annual Digest*, 1929-1930, Case No. 22, Dickinson, *loc. cit.*, n. 27, p. 138 above, p. 225.

<sup>58</sup> (1926), 53 J.D.I., 1926, p. 943, *Annual Digest*, 1925-1926, Case No. 18. In fact, the Soviet law of marriage and divorce was more similar to the French law than the old Russian law. See Grouber and Tager, *La Révolution Bolchevique et le Statut Juridique des Russes; le Point de Vue de la Jurisprudence Française*, 51 J.D.I., 1924, p. 8, at p. 27.

<sup>59</sup> *Soviet Marriages in Hungary Case*, Royal Hungarian Court of Appeal, *Annual Digest*, 1925-1926, Case No. 22.

<sup>60</sup> *Jelinkova v. De Serbouloff*, 54 J.D.I., 1927, p. 189, *Annual Digest*, 1925-1926, Case No. 20. The same court in a later decision upheld a divorce, recognising the Kerensky laws in preference to Soviet laws (*Digmeloff v. The State Civil Officer of St.-Josse-ten-Noode* (1928), 55 J.D.I., 1928, p. 1253, *Annual Digest*, 1927-1928, Case No. 45).

and a Belgian Court, respectively, on the ground that the requirements of the Czarist laws had not been met.

In more recent decisions Hungarian courts have abandoned political non-recognition as a ground for the non-recognition of Soviet marriages, and have adopted, instead, the doctrine of public policy.<sup>61</sup> The Federal Court of Switzerland, in consonance with its earlier judgment,<sup>62</sup> held that Soviet laws could be taken cognizance of so long as they did not offend against the canons of public policy.<sup>63</sup> A certificate by a Soviet Official that Russian law would recognise a decree of divorce pronounced by the Swiss courts was accepted by the court as a finding of fact.

### § 5. CONTRACT AND SUCCESSION

(In cases concerning contracts the effect of the laws of unrecognised powers seems to have been more universally recognised.) In *Dougherty v. Equitable Life Assurance Society* (1929), the lower court held that the annulment of life insurance policies by Soviet decree was a good defence to an action on a policy issued by a New York Company in Russia before the revolution.<sup>64</sup> The judgment was reversed by the Appellate Division of the Supreme Court of New York who relied upon the authority of the *Sokoloff* case and *Sliosberg v. New York Life Insurance Co.* (1927).<sup>65</sup> *Dougherty v. Equitable Life Assurance Society of U.S.* was again reversed by the Court of Appeals of New York<sup>66</sup> in 1934, after the recognition of the Soviet Government by the United States. Although the circumstances had vitally altered since the decision in the Appellate Division, owing to the intervening recognition in 1933, yet the criticism of the Court of Appeals that the court had relied wrongly upon the *Sokoloff* and the *Sliosberg* cases was nevertheless valid. For in those two cases the contracts in question were American contracts and the 'proper law' could

<sup>61</sup> In *Klaudia K. v. B.F.*, the Sup. Ct. of Hungary held that a *de facto* marriage could be recognised in an action for maintenance (*ibid.*, 1925-1926, p. 32, n).

<sup>62</sup> *Hausner v. Banque Internationale de Commerce de Petrograd* (1924), see below, p. 168, n. 6.

<sup>63</sup> *Tcherniak v. Tcherniak* (1928), *Annual Digest*, 1927-1928, Case No. 39.

<sup>64</sup> (1929) 135 Misc. (N.Y.) 103.

<sup>65</sup> (1927) 244 N.Y. 482, 155 N.E. 749, Hudson, p. 129.

<sup>66</sup> (1934) 266 N.Y. 71, 193 N.E. 897, Hudson, p. 152.

not have been Russian law in any case.<sup>67</sup> The *Sliosberg* case did not actually decide that point at all. It merely declared Section 169a of the Civil Practice Act unconstitutional, as it would deprive parties entitled to sue of their legal remedy.<sup>68</sup> Even if the intervening recognition had not taken place, it is not believed that, in the face of these criticisms, the judgment of the Appellate Division could have been sustained.

The effect of Soviet decrees upon contracts made in Russia was recognised by Swiss,<sup>69</sup> Egyptian,<sup>70</sup> and Belgian courts. The Belgian court declared:

‘It appears to be impossible to ignore completely the fact of the existence of the Soviet Government; nor, in the face of circumstances which show every prospect of continuing indefinitely, can the courts refuse absolutely all effect to the only system of law in actual application in Russia today without gross inequity.’<sup>71</sup>

In matters of succession, French<sup>72</sup> and Egyptian<sup>73</sup> courts applied the old Russian law. There was obvious difficulty in applying Soviet law because it was confiscatory and it was impossible to enforce a confiscatory law on behalf of a government not recognised.<sup>74</sup> In German courts, the Soviet law was also suppressed, but, instead of the old Russian law, the German law of intestate succession was applied.<sup>75</sup> This last solution appears to be a sound one, since, in applying the law of the forum, the court was merely resorting to the undisputed doctrine of public policy.

<sup>67</sup> See Dickinson, *loc. cit.*, p. 226, n. 55. [Similarly, in *Merilaid & Co. v. Chase Nat. Bank of City of N.Y.* ((1947) 71 N.Y.S. (2d) 377), the Supreme Court of New York County pointed out: ‘The property in this action is located in New York, where the contract relation was originated . . . The public policy of the State determines when the foreign legislation will apply, and a decree which is contrary to that policy will not be given effect.’]

<sup>68</sup> Crane J., in the *Dougherty* case, Hudson, p. 155.

<sup>69</sup> *Schinz v. High Ct. of Zurich* (1926), *Annual Digest*, 1925-1926, Case No. 23.

<sup>70</sup> *Charalambos Papadopoulos v. Monastery of Mount-Sinai*, Mixed Court of Appeal of Egypt (1927), *ibid.*, 1927-1928, Case No. 41.

<sup>71</sup> *N. D'Aivassoff v. De Raedemaker* (1927), *ibid.*, 1927-1928, Case No. 46.

<sup>72</sup> *Grouber and Tager*, *loc. cit.*, p. 16.

<sup>73</sup> *Hanawi v. Crédit Lyonnais*, *Annual Digest*, 1925-1926, Case No. 21.

<sup>74</sup> [See also *Merilaid & Co. v. Chase Nat. Bank of City of N.Y.* (1947), 71 N.Y.S. (2d) 377, in which an American court refused to give effect to a confiscatory decree of the unrecognised Estonian Soviet Republic.]

<sup>75</sup> Freund, *La Révolution Bolchevique et le Statut Juridique des Russes; le Point de Vue de la Jurisprudence Allemande*, 51 J.D.I., 1924, p. 51, at pp. 58-9.

## § 6. PROCEDURAL RIGHTS OF PRIVATE LITIGANTS

The procedural rights of foreigners in ordinary American courts are not affected by the non-recognition of their government. This right is a right under the law of the forum and not a right under international law.<sup>76</sup> The conditions for bringing the suit are the same, irrespective of the recognition of the plaintiff's government.<sup>77</sup>

The right to bring an action against the United States in the Court of Claims is, according to Section 135 of the United States Judicial Code, conditioned upon reciprocity.<sup>78</sup> In *Rossia Insurance Co. v. U.S.* (1923),<sup>79</sup> the plaintiff contended that, the Soviet Government being unrecognised, the court should presume the continuance of the pre-revolutionary law under which American citizens were permitted to prosecute claims against the Russian Government.<sup>80</sup> The court rejected the argument, holding that 'our jurisdiction depends upon the ascertainment of an existing and easily provable fact'.<sup>81</sup> In *Russian Volunteer Fleet v. U.S.* (1930), the United States Supreme Court decided that the constitutional rights of individuals under the Fifth Amendment do not depend upon the reciprocity of other governments. The right of aliens to recover just compensation 'should not be defeated or postponed because of the lack of recognition by the Government of the United States of the régime in his country'.<sup>82</sup>

<sup>76</sup> The right of aliens to sue, though grounded on comity, has become a fixed right in the United States. See Kellogg J., in *Slisberg v. N.Y. Life Ins. Co.* (1927), 244 N.Y. 482; Hudson, p. 132. But see *Russian Reinsurance Co. v. Stoddard* (1925), 240 N.Y. 149, *Cases*, 172.

<sup>77</sup> *Falkoff v. Sugerman* (1925), 26 Ohio N.P. (N.S.) 81, cited in Dickinson, *loc. cit.*, p. 221.

<sup>78</sup> 36 U.S. St. L. 1139; quoted *ibid.*

<sup>79</sup> (1923) 58 Ct. Cl. 180, *Annual Digest*, 1923-1924, Case No. 18.

<sup>80</sup> This was the view held by the Civil Tribunal of Brussels in *Bekker v. Willcox* (1923), *ibid.*, Case No. 22.

<sup>81</sup> Quoted in Tennant, *loc. cit.*, n. 18, p. 144 above, p. 718.

<sup>82</sup> *Russian Volunteer Fleet v. U.S.* (1929), 68 Ct. Cl. 32, 1930) 282 U.S. 481, 492.



## CHAPTER 12

### SUGGESTIONS FOR A REALISTIC APPROACH

THE review of the judicial practice, in particular of the British and American courts, seems to yield the following conclusions: the right of a foreign power to sue in a national court is a matter of comity; where there is no comity, the fact of having been recognised does not necessarily entitle a foreign power to institute suits; the right of immunity, whether based upon comity or non-submission, is, likewise, not a necessary consequence of recognition, although recognition usually implies comity; international acts of actual governments are generally regarded as binding upon the nation, notwithstanding the lack of recognition.)

(As regards the effect of non-recognition upon private litigation in which the validity of laws or acts of the unrecognised power is involved, there is, on the whole, a lack of uniformity and consistency in the decided cases.) Laws of unrecognised powers as *lex contractus* in private contracts are generally enforced. The United States, according to its own internal law, allows procedural rights to aliens, irrespective of the recognition of their governments. Questions of personal status, marriage and divorce seem to depend upon the recognition of the power whose law is in question. But this is not conclusive, as some courts have based their judgments on the principle of public policy. (Questions of property and succession are generally complicated by the confiscatory character of the laws of the unrecognised power, and the non-application of these laws need not imply the non-existence of the power in question.) In cases regarding the status of moral persons created or dissolved by the laws of unrecognised powers, the American decisions evinced a tendency to admit the existence of those laws. When feasible, the court would try to avoid direct judgments on that point, and the desire to give protection to local interests seems to have entered into the consideration of the judges in several instances.

The application of foreign laws in private litigation is

essentially a question of private, rather than public, international law. It is not believed that there exists a general right of one State to have its laws applied in the courts of another State although, in practice, a State usually shows respect for the laws of a friendly State, and to reject them *en bloc* may be regarded as contrary to comity, the basis of the conflict of laws being the rendering of internal justice, and not the promotion of international friendship. A foreign law is applied not because it is the expression of sovereign will, but because it does in fact create legal relations within its territory, and such a fact provides a solution to the question at bar. Under the modern theory, the foreign law is regarded as mere fact, one of the facts upon which the decision is to be based.<sup>1</sup> From this point of view, the fact that a law emanates from a recognised or an unrecognised foreign power is immaterial to its applicability in a particular case, so long as that law does in fact govern the case.<sup>2</sup>

Those who oppose this view and follow Lord Eldon's doctrine that the court must not take notice of new States or governments not recognised by the government<sup>3</sup> seem to be obsessed by two fears: that by admitting the validity of the laws of unrecognised powers there is a danger of disharmony with the executive<sup>4</sup>; and that, by so admitting, the court would be bound to give full effect to such laws, however objectionable. These

<sup>1</sup> Beale, *A Treatise on the Conflict of Laws*, 1935, vol. I, p. 53. [See also *A/S Tallinna Laevauhisus et al. v. Estonian State Shipping Line* ((1946) 80 Lloyd's List L.R. 99) the Court of Appeal held that since the plaintiffs had introduced evidence of the law of the former Estonian government, while no evidence was introduced of Soviet law or of the law of the Estonian Soviet Republic which was recognised as the *de facto* government of Estonia, they were entitled to the insurance moneys in issue, for foreign law must be proved as a fact.]

<sup>2</sup> See *Tallinna Laevauhisus* case (1946). Noël-Henry concedes that, although the court may refuse to admit the juridical capacity of an unrecognised power, it should not ignore what that power has actually accomplished (n. 32, p. 110 above, p. 242). It is suggested by another writer that, in conflict of laws cases, the foreign territorial law is the law of the 'actual organised social control', rather than the law of the 'sovereign in political theory'. As these cases are not concerned with claims associated with or derived from political sovereignty, the application of such territorial laws does not affect the question of political recognition. (Notes, 38 H.L.R., 1924-1925, p. 820).

<sup>3</sup> Grouber and Tager, *loc. cit.*, n. 58, p. 162 above, p. 8; Idelson, *La Révolution Bolchevique et le Statut Juridique des Russes; le Point de Vue de la Jurisprudence Anglaise*, 51 J.D.I., 1924, p. 28; Prudhomme, n. 11, p. 152 above, p. 318; Crane, *Le Statut du Gouvernement Soviétique en Angleterre et en Amérique*, 52 J.D.I., 1925, p. 344; Italian and Egyptian practice cited in Jaffe, *op. cit.*, n. 21, p. 15 above, p. 189.

<sup>4</sup> [See *Latvian State Cargo and Passenger S.S. Line v. Clark* ((1948) 80 F. Supp. 683).]

fears can be easily dispelled. In the first place, the court does not act for the State in the international sphere and its decisions do not bind the State. As a refusal to apply a foreign law does not imply non-recognition of the foreign power, its application is similarly irrelevant to the question of recognition, which is a political function. Courts in conflict of laws cases have often treated laws of political subdivisions as foreign laws, without necessitating the implication of recognition as sovereign.

As to the second point, courts are not bound even to give effect to laws of powers which have been recognised, when such laws are found to be contrary to the public policy of the forum.<sup>5</sup>

(Since the great majority of the cases regarding property and succession, reviewed above, had to do with the confiscatory laws of the unrecognised power, these questions could be conveniently covered by the principle of public policy.<sup>6</sup>) In cases regarding

<sup>5</sup> Scrutton L.J., in *Luther v. Sagor* ([1921] 3 K.B. 532, 538) and Kellogg J., in *Sliosberg v. New York Life Ins. Co.* (1927), 244 N.Y. 482, Hudson, 134) seem to suggest that laws of recognised foreign governments must in no case be refused application. But the more generally accepted view is that a law, even emanating from a recognised power, may be rejected on the grounds of public policy, the penal or political character of the law in question. See *Folliott v. Ogden* (1789), 1 H.B.L. 123; *Ogden v. Folliott* (1790), 3 Term Rep. 726; *Kaufman v. Gerson* [1904], 1 K.B. 591; *Lecouturier v. Rey* [1910] A.C. 262; *Vladikavkazsky Rly. Co. v. N.Y. Trust Co.* (1934), 263 N.Y. 369, *Annual Digest*, 1933-1934, Case No. 27; *obiter dictum* in *Dougherty v. Equitable Life Ass. Soc. of U.S.* (1934), 266 N.Y. 71, Hudson, p. 152, at p. 155; Decision of Ct. of Athens, 52 J.D.I., 1925, p. 1143; *In re Etat Russe v. Cie Russe de Navigation (Ropin)*, Trib. Com. de Marseilles (1925), *ibid.*, p. 391; *same v. same*, Ct. App. of Aix, France (1925), Hudson, p. 149; *Cie Nord de Moscou v. Phénix Espagnol*, Ct. App., Paris (1928), *Annual Digest*, 1927-1928, Case No. 42; *U.R.S.S. v. Intendant Général*, Cour de Cass., France (1928), *ibid.*, Case No. 43; *Société Vairon v. Banque de Commerce de Sibérie*, Cour de Cass., France (1929), *ibid.*, p. 67; *A/S Merilaid & Co. v. Chase Nat. Bank of N.Y.* (1947), 71 N.Y.S. (2d) 377. See also Cheshire *Private International Law*, 1947, p. 175 *et seq.*; Habicht, *The Application of Soviet Laws and the Exception of Public Order*, 21 A.J.I.L., 1927, p. 238; Fachiri, *Recognition of Foreign Laws by Municipal Courts*, 12 B.Y.I.L., 1931, p. 95, at p. 101; Prudhomme, *loc. cit.*, p. 328; Freund, *Les Rapports des Traités Russo-Allemands et l'Application du Droit Soviétique en Allemagne*, *ibid.*, p. 331, at p. 339; Lipstein, *loc. cit.*, n. 42, p. 159 above. The Court of Rome in *Federazione Italiana Consorzi Agrari v. Commissariat of the Soviet Socialist Republic and Società Romana Solfati* (1923), although rejecting the Soviet law as contrary to public order, however, hinted that a different decision might be given, had the commercial agreement with the Soviets been ratified by the Italian Parliament (51 J.D.I., 1924, p. 257); *Annual Digest*, 1923-1924, Case No. 5. In *Nomis di Pollone v. Cooperativa Garibaldi* (1924), Soviet law was rejected because the Soviet Government was only recognised *de facto*. But in an *obiter dictum*, the court said that, even if the Soviet Government were recognised *de jure*, its law would be no more enforceable (52 J.D.I., 1925, p. 226).

<sup>6</sup> This principle was applied by a Swiss court (*Hausner v. Banque Internationale de Commerce de Petrograd* (1924), 52 J.D.I., 1925, p. 488), and agrees with the practice of German courts (Freund, *La Révolution Bolchevique et le Statut Juridique des Russes; la Point de Vue de la Jurispru-*

the dissolution of corporations by the laws of unrecognised powers, limitation on the effect of these laws may be achieved by interpreting them as merely putting the corporations in liquidation, without the immediate necessity of destroying their existence.<sup>7</sup> Or, in order to give protection to local interests, the court might, while admitting the dissolution of the foreign corporations, allow the former directors to collect the assets of the corporations for the benefit of the shareholders. Alternatively, the court might deny the rule that dissolution at the place of domicile is effective elsewhere, and hold that the status of corporations is a matter for the decision of the forum.<sup>8</sup> It is thought that to allow the foreign corporation to be dissolved according to the laws of the unrecognised power and to place the proceeds of liquidation under public guardianship is more conducive to justice than to allow former directors to dispose of the property without restriction.<sup>9</sup>

(By treating the question of the validity of laws and acts of an unrecognised power as a simple application of the ordinary principles of private international law, it is believed that many suggestions for an artificial compromise between non-recognition and the necessity for justice would be rendered unnecessary.) The suggestions, for instance, that the existence of unrecognised powers may be treated as an instance of *force majeure*,<sup>10</sup> or that

*dence Allemande*, 51 J.D.I., 1924, p. 51, at p. 55). The Ct. of App. of Amsterdam upheld a law of the unrecognised Soviet Government which was found to be not contrary to Dutch public order (*Herani, Ltd. v. Wladikawkaz Rly. Co.* (1942), *Annual Digest*, 1919-1942 (Supplementary Volume, Case No. 10). In a recent English case, a law of a government recognised *de facto* was rejected on the ground, *inter alia*, of its confiscatory character (*Tallinna Laevauhisus Ltd. v. Nationalised Tallinna Laevauhisus and Estonia State Shipping Line* (1946), 79 Lloyd's List, L.R. 245); [on appeal, however, the Court seemed to rely on the fact that the Soviet and Estonian laws in issue were not proved (80 Lloyd's List L.R. 99).]

<sup>7</sup> This method has been applied by British courts. See the dissenting opinion of Atkin L.J., in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1923], 2 K.B. 630, 633, adopted by House of Lords, on appeal, (1924) 40 T.L.R. 837, 841. Similarly, *Employers' Liability Ass. Corp. v. Sedgwick, Collins & Co.* [1927], A.C. 95; the *Tallinna Case* (79 Lloyd's List L.R. 245). Also see the decision of French Ct. App. of Aix in *U.R.S.S. v. Ropit* (1925), Hudson, p. 149, at p. 151; and the decision of Dis. Ct. of Dordrecht, Holland, in *Vseobitchnaia Stroitelnaia Kompania v. L. J. Smit* (1927), *Annual Digest*, 1927-1928, Case No. 47. Hinted as a possible approach to the problem of non-recognition in *James v. Second Russian Ins. Co.* (1925), 239 N.Y. 248, 255, Hudson, pp. 125-6.

<sup>8</sup> Nebolsine, *The Recovery of the Foreign Assets of Nationalised Russian Corporations*, 39 Yale L.J., 1929-1930, p. 1130, cited in Tennant, *loc. cit.*, n. 18, p. 144 above, p. 733.

<sup>9</sup> Fraenkel, *loc. cit.*, n. 1, p. 135 above, p. 566.

<sup>10</sup> Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 125.

effect should be given to acts of unrecognised powers where violence to fundamental principles of justice or public policy of the forum might otherwise be done<sup>11</sup> would seem to add very little to the solution provided by the ordinary principles of the conflict of laws. For, as regards the former suggestion, since all foreign laws are, in principle, treated as facts in private international law, the notion of *force majeure* would be superfluous. As to the latter suggestions, since the basis for the application of foreign law is the rendering of internal justice, it might be said that there is a general public policy requiring the application of all the laws of unrecognised powers *according to the rules of private international law* (including the rule regarding the exception of public order)! Further, it may be pointed out that if the refusal to apply the laws of an unrecognised power is based upon the view that such a power has no juridical existence, then, even as an exception, such laws ought not to be given cognizance.

In conclusion, (it may be said that the applicability of laws of a foreign power in private litigation ought not to be determined by the political recognition or non-recognition of that power, and sufficient safeguards against objectionable legislation can always be found in the ordinary principles of private international law.) Although recognition by the government is sufficient to establish the fact of the existence of a political entity, (non-recognition need not deny such existence, and, consequently, does not preclude the court from determining the rights and obligations arising out of such existence.) This view is fully endorsed by the Institute of International Law.<sup>12</sup> Article 1 (3) of its Resolution of 1936 reads:

‘The existence of a new State with all the juridical effects which are attached to that existence is not affected by the refusal of recognition by one or more States.’

[Similarly, in Article 9 of the Bogotá Charter, 1948, the Organisation of American States declared:

‘The political independence of the State is independent of recognition by other States.’<sup>13</sup>

<sup>11</sup> *Sokoloff v. National Bank of N.Y.* (1924), Cases, p. 160; Habicht, *loc. cit.*, p. 252. See comments on this doctrine of the ‘inverse of the exception of public order’ in Dickinson, *loc. cit.*, n. 27, p. 138 above, p. 237; Tennant, *loc. cit.*, pp. 721-3, 725-6.

<sup>12</sup> 30 A.J.I.L., 1936, Supplement, p. 186.

<sup>13</sup> [18 Dept. of State, *Bulletin*, p. 666.]

In the same way, although it makes no reference to recognition, the Draft Declaration on Rights and Duties of States adopted by the International Law Commission provides:

‘Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, . . . (and) has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognised by international law.’<sup>14]</sup>

In Article 17 of the Institute’s Resolution, it is further provided that, even after a government is recognised *de jure*, the extra-territorial effect of its acts are nevertheless subject to the exception of public order and that non-recognition does not imply the denial of such extraterritorial effect. The practice of the American courts has clearly demonstrated that the continued ignoring of the laws of a power whose existence could not be denied<sup>15</sup> creates a condition of artificiality and unreality which is embarrassing, unreasonable and unjust.

In a case decided after the recognition of the Soviet Government, the New York Court of Appeals, in retrospect, declared that in all the pre-recognition cases its decision had been based upon public policy, and that the decisions in the earlier cases would be the same, if they had been heard at the time recognition had been granted.<sup>16</sup>

<sup>14</sup> [Report of the First Session, U.N. Doc. A/925, 1949, p. 8, Arts. 1 and 2.]

<sup>15</sup> The courts have constantly admitted the factual existence of the Soviet Government (see *Wulfsohn v. R.S.F.S.R.* (1923), Hudson, p. 112, Green, *op. cit.*, n. 7, p. 141 above, No. 35; *R.S.F.S.R. v. Cibrario* (1923), Hudson, p. 117; *James v. Second Russian Ins. Co.* (1924), *ibid.*, p. 126; *Sliosberg v. New York Life Ins. Co.* (1927), *ibid.*, p. 131; *Salimoff v. Standard Oil Co. of N.Y.* (1933), *ibid.*, p. 137), and so did the communications of the State Department (in *Russian Government v. Lehigh Valley R.R. Co.* (1919), 293 Fed. 135, 137, quoted in Tennant, *loc. cit.*, p. 710; *Salimoff case*, Hudson, p. 136). It is suggested by Connick that whether effect should be given to acts of unrecognised powers depends upon whether, in withholding recognition, the government has chosen to deny the existence of that power altogether or merely to refuse diplomatic intercourse with it, and that in the Soviet cases the existence was not denied (*The Effect of Soviet Decrees in American Courts*, 34 Yale L.J., 1925, p. 499, at p. 501).

<sup>16</sup> *Vladikavkazsky Rly. Co. v. N.Y. Trust Co.* (1934), 263 N.Y. 369, *Annual Digest*, 1933-1934, Case No. 27.

## CHAPTER 13

### RETROACTIVITY OF RECOGNITION

#### § 1. THE NATURE OF THE DOCTRINE OF THE RETROACTIVITY OF RECOGNITION

It has been settled since the decision in *Luther v. Sagor* (1921) that the doctrine of the retroactivity of recognition is an accepted principle of English law. In that case, the Court of Appeal held that, the Soviet Government being recognised, it must be treated as 'having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal.'<sup>1</sup> In arriving at this decision, the court did not refer to any English authority, but accepted as 'weighty expressions of opinion' the judgments of the United States Supreme Court in *Williams v. Bruffy* (1877),<sup>2</sup> *Underhill v. Hernandez* (1897),<sup>3</sup> and *Oetjen v. Central Leather Co.* (1918).<sup>4</sup>

The question had previously arisen on several occasions in English courts. In *Wright v. Nutt* (1789), the Lord Chancellor, referring to a law passed by the legislature of Georgia during the American Revolution, said that while 'it may be a question for private speculation, whether such a law was wise or improvident, . . . we must take it as the law of an independent country'.<sup>5</sup> The same view was taken by the Court of Common Pleas in *Folliott v. Ogden* (1789).<sup>6</sup> But in two subsequent decisions by the Court of King's Bench (*Ogden v. Folliott* (1790)<sup>7</sup> and *Dudley v. Folliott* (1790))<sup>8</sup> the position was reversed.<sup>9</sup> The judgment in the former case was affirmed by the High Court of Parliament. The question of retroactivity was specially brought up by the counsel for the

<sup>1</sup> [1921] 3 K.B. 536, 543.

<sup>2</sup> (1877) 96 U.S. 176, 186.

<sup>3</sup> (1897) 168 U.S. 250, 253.

<sup>4</sup> (1918) 246 U.S. 297, 302-3.

<sup>5</sup> (1789) 1 H.Bl. 136, 149.

<sup>6</sup> (1789) 1 H.Bl. 123, 135.

<sup>7</sup> (1790) 3 Term Rep. 726; (1792) 4 Bro. Parl. Cas. 111.

<sup>8</sup> (1790) 3 Term Rep. 584.

<sup>9</sup> See above, p. 158.

plaintiff in error,<sup>10</sup> and was expressly ruled out by the court.<sup>11</sup> The question was again raised in *Barclay v. Russell* (1797). It was held that the Treaty of 1783 acknowledged the independence of the United States from the year 1776. 'From the declaration of independence it (the Treaty) considers it (the United States), no matter how created, as an independent power.'<sup>12</sup>

This conflict of judgments was at last settled by *Luther v. Sagor*, which has since been consistently followed.<sup>12a</sup> Soviet decrees made before recognition were later treated as acts of sovereign authorities.<sup>13</sup> In *Princess Paley Olga v. Weisz* (1929),<sup>14</sup> the Court of Appeal expressly adopted the doctrine of retroactivity, which Mackinnon J. had rejected in the Court below, as the ground for its judgment. In 1933 the express sanction of the House of Lords was given to the doctrine in *Lazard Bros. and Co. v. Banque Industrielle de Moscou*, the same v. *Midland Bank Ltd.*<sup>15</sup> [In *R. v. Kosciukiewicz*, *R. v. Ulatowski* (1948), Goddard L.C.J. showed that the doctrine of the retroactivity of recognition had been embodied in an English statute. The Polish National Government was recognised by Great Britain on July 5, 1945,<sup>16</sup> and in 1947 the Polish Resettlement Act,<sup>17</sup> regulating the position of Polish soldiers who refused to recognise the authority of the new Government, came into force. This Act stated<sup>18</sup>: 'As regards any period between the first day of January, 1945, and the passing of this Act the powers conferred

<sup>10</sup> (1792) 4 Bro. Parl. Cas. 111, 130.

<sup>11</sup> *Ibid.*, pp. 132-3.

<sup>12</sup> (1797) 3 Ves. Jun. 423, 433, 434.

<sup>12a</sup> [In *Boguslawski v. Gdynia Amerika Line*, [1949] 1 K.B. 157, however, Finmore J. did not regard the recognition of the new Polish Government as retroactive to the date of its establishment. This was because the statement of the Foreign Office declared that the former Government had been recognised to a certain date, and the new Government from that date, although it had been established a week earlier; confirmed on appeal [1950] 2 All E.R. 355. See also *Civil Air Transport Inc. v. Chennault* (1950), n. 14, p. 120 above.]

<sup>13</sup> *Russian Com. and Ind. Bank v. Comptoir d'Escompte de Mulhouse* [1925], A.C. 112; *Banque Int. de Com. de Petrograd v. Goukassow*, *ibid.*, p. 150; *Employers' Liability Ass. Corp. Ltd. v. Sedgwick, Collins & Co. Ltd.* [1927], A.C. 95; *The Jupiter* (No. 3) [1927], P. 250; *First Russian Ins. Co. v. London and Lancashire Ins. Co.* (1928), 44 T.L.R. 583; *Perry v. Equitable Life Ass. Soc. of U.S.A.* (1929), 45 T.L.R. 468; *Kolbin v. Kinnear* [1930], S.C. 737; *In re Russian Bank for Foreign Trade* [1933], Ch. 745.

<sup>14</sup> [1929] 1 K.B. 718; [1929] 141 L.T. 207.

<sup>15</sup> [1932] 1 K.B. 617; [1933] A.C. 289, 297.

<sup>16</sup> *Langer, op. cit.*, n. 28, p. 60 above, p. 279.

<sup>17</sup> 10 & 11 Geo. 6, c. 19.

<sup>18</sup> S. 9 (8).



by Section 1 (1) of the Allied Forces Act, 1940,<sup>19</sup> shall be deemed to have been exercisable in relation to the said forces by reference to the law of Poland in force on that day and as if the said forces had not ceased to be recognised by the Government of Poland.' Of this Section, Goddard L.C.J. said: 'It is clear . . . that the Government of Poland, which we must take to be the Government of Poland recognised by His Majesty, had ceased to regard these men as Polish soldiers. . . . Obviously what this Section shows is that from January 1, 1945, by which time a new Government was set up in Poland which by the very terms of this Section it is clear was recognised by His Majesty, that Government refused to recognise' the appellants as Polish soldiers.<sup>20</sup>]

The earliest American case in which the principle of retroactivity was invoked is *Murray v. Vanderbilt* (1863) relating to decrees of the Rivas-Walker Government of Nicaragua.<sup>21</sup> In *Williams v. Bruffy* (1877),<sup>22</sup> the principle of retroactivity was embodied in an *obiter dictum* and no authority was cited in its support. Bankes L.J. in *Luther v. Sagor* (1921), however, agreed that on principle the *dictum* was sound.<sup>23</sup> In *Underhill v. Hernandez* (1897) the defendant was sued for damages arising out of acts committed in his capacity as Commanding Officer of the party in revolt in Venezuela in 1892. Fuller C.J., in dismissing the action, declared that if a revolutionary government succeeds and is recognised 'then the acts of such government, from the commencement of its existence, are regarded as those of an independent nation'.<sup>24</sup> In *Oetjen v. Central Leather Company* (1918) the validity of a confiscatory act by the Carranza Government of Mexico prior to its recognition by the United States, was in issue, the Supreme Court of the United States said:

'When a government which originates in revolution or revolt is recognised by the political department of our government as the

<sup>19</sup> 3 & 4 Geo. 6, c. 51.

<sup>20</sup> [(1948) 33 Cr. App. R. 41, 47-8. *Cx. Boguslawski v. Gdynia-Amerika Line*, [1949] 1 K.B. 157, [1950] 2 All E.R. 355.]

<sup>21</sup> (1863) 39 Barb. 140; quoted in Hervey, *op. cit.*, p. 92. The earlier case of *Kennett v. Chambers* (1852), 14 How. 38, has often been cited as a denial of the doctrine of retroactivity. In that case, the contract in question was illegal because of the breach of neutrality, not because of the lack of recognition. It therefore could not be validated by subsequent recognition.

<sup>22</sup> (1877) 96 U.S. 176, 186.

<sup>23</sup> [1921] 3 K.B. 536, 543.

<sup>24</sup> (1897) 168 U.S. 250, 253.

*de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognised from the commencement of its existence.’<sup>25</sup>

The principle has been frequently invoked and followed in later American decisions<sup>26</sup> and has also gained acceptance in European courts.<sup>27</sup>

(In spite of such widespread adoption in practice, writers on international law are not entirely agreed whether the retroactive effect is inherent in the act of recognition, and whether the doctrine of retroactivity is a principle of international law.

Several writers have answered the first question in the negative.<sup>28</sup>) Professor Lauterpacht and Mr. Jones think that the attribution of retroactive effect to recognition is mainly the result of political considerations rather than of juristic logic. Thus Professor Lauterpacht writes:

‘Essentially, the principle of retroactivity of recognition is one of convenience. It would not be conducive to the maintenance of friendly relations if, after recognition had been given, courts were to continue to proceed on the theory that, for instance, legislative acts of expropriation prior to recognition were acts of “thieves and robbers” and conferred no title.’<sup>29</sup>

<sup>25</sup> (1918) 246 U.S. 297, 302-3.

<sup>26</sup> *U.S. v. Trumbull* (1891), 48 F. 94, Hudson, p. 822; *Ricaud v. American Metal Co.* (1918), 246 U.S. 304; *Montebanco Real Estate Corp. v. Wolvin Line* (1920), 85 Southern 242, *Annual Digest*, 1919-1922, Case No. 29; *Terrazas v. Holmes, same v. Donohue*, (1925), 115 Tex. 32, 46; *Annual Digest*, 1925-1926, Case No. 43; *Lehigh Valley R.R. v. State of Russia* (1927), 21 F. (2d) 396, Hudson, p. 118, at p. 120; *Salimoff v. Standard Oil Co.* (1933), 262 N.Y. 220, Hudson, p. 135; *Vladikavkazsky Rly. Co. v. N.Y. Trust Co.* (1934), 263 N.Y. 369, *Annual Digest*, 1933-1934, Case No. 27; *Dougherty v. Equitable Life Ass. Soc.* (1934), 266 N.Y. 71, Hudson, p. 152; *U.S. v. Belmont* (1937), 301 U.S. 324; *Guaranty Trust Co. v. U.S.* (1938), 304 U.S. 126; *U.S. v. Pink* (1942), 315 U.S. 203; *U.S. v. New York Trust Co.* (1946), 75 F. Supp. 583. See also Jones, *The Retroactive Effect of the Recognition of States and Governments*, 16 B.Y.I.L., 1935, p. 42; Nisot, *Is the Recognition of a Government Retroactive?* 21 *Canadian Bar Review*, 1943, p. 627; Hervey, *op. cit.*, p. 82 et seq.

<sup>27</sup> French cases: *Cie Nord de Moscou v. Phénix Espagnol* (1928), *Annual Digest*, 1927-1928, Case No. 42; *De Mayenne v. Joutel* (1926), *ibid.*, Case No. 44, 55 J.D.I., 1928, p. 710; *Banque Com. Sibérie v. Vairon* (1928), 56 *Ibid.*, 1929, p. 115; *In re Marmatscheff* (1929), *Annual Digest*, 1929-1930, Case No. 150; *In re Marchak v. Rabinerson* (1933), 60 J.D.I., 1933, p. 959. Dutch case: *West Russian S.S. Co. v. Sucksdorff* (1920), *Annual Digest*, 1919-1922, Case No. 103.

<sup>28</sup> Jones, *loc. cit.*, p. 55; Nisot, *loc. cit.*, p. 627; Lauterpacht, pp. 59-60. Noël-Henry thinks that the doctrine of retroactivity can only be applied by internal, but not international, judges (*op. cit.*, ss. 153-6).

<sup>29</sup> Lauterpacht, p. 60.

But were they 'acts of thieves and robbers'? If they really were, it is doubted whether the doctrine of retroactivity should ever be accepted as a principle of justice. For (it would be contrary to all reason and common sense that acts of thieves and robbers could under any circumstance be treated as acts of government, simply at the convenience of a foreign State. (An act can be treated as an act of government only because it has always been one, although the treatment of it as such may have been overdue.)

(Nisot's theory is that retroactive effect is not inherent in the recognition, but is the result of the endorsement of the acts in question by the power recognised. 'For the recognising State', he says, 'the recognised Government is, as from the moment of recognition, competent to state authoritatively the law, *past and present*, of the other State.'<sup>30</sup> The effect of recognition, according to this view, is merely to determine the authority competent to say what acts are and what acts are not valid in its country in both the past and the present. This would mean that in every litigation before the courts of the recognising State, in which the validity of a prior act of the recognised power is in issue, the courts should make applications to the latter power to ascertain whether in *its* opinion the act in question is regarded as valid. It is not believed that this corresponds with the practice of the courts of any country. What they do is merely to establish that the act in question is the act of the power subsequently recognised, and the attributes of sovereignty are automatically attached to it. It is not open to the recognised power by means of a subsequent 'authoritative statement' to repudiate what has been done, or to claim that something has been done which in fact has not been done. To allow the recognised power to do this would be to accord it a privilege not permitted even to the government of the forum, as it would amount to *ex post facto* legislation. Whether an act is or is not an act of the government subsequently recognised, it is believed, should be judged by an objective test, not by the subjective determination of the government itself. Thus Poland, at the end of the War of 1914-1918, contended that she had always been in existence since the Third Partition. Would the courts, according to Nisot's theory, be obliged to regard

<sup>30</sup> Nisot, *loc. cit.*, p. 631.

Polish law, rather than Austrian, Prussian and Russian laws, as the law of the land from 1795 to 1918, if the Polish Government should so regard it? <sup>31</sup> In *The Jupiter* (No. 3) (1927), it was contended by the defendant that confiscation by the Odessa Soviet in November, 1917, was in exercise of the sovereignty of the Ukrainian Soviet Socialist Republic. Hill J. refused to accept this theory on the ground that there was no continuity of governmental activities. <sup>32</sup> It is not believed that the case would have been otherwise decided even had the Ukrainian Soviet Socialist Republic expressly endorsed the act. <sup>33</sup>

(While not sharing the view that the retroactivity of recognition is indirect or that it is subject to the convenience of the recognising State, it is, however, not contended that such retroactivity is always inherent in the recognition. Recognition is retroactive only in cases where there is a disparity of time between the commencement of the actual existence of a power and its recognition by the government of the forum, and where the court is bound by the principle of judicial self-limitation. Where such conditions exist, recognition by the political department liberates the court from the doctrine of judicial self-limitation and enables it to assess the significance of the acts of the previously unrecognised power on their merits, without the danger of transgressing the prerogative of the executive. In this sense, retroactivity may be said to flow directly from the recognition.)

As regards the question whether retroactivity of recognition is a principle of international law, the answer is that (so long as States continue to base recognition upon factors other than the fact of existence international law must allow recognition to be retroactive. It may be regarded as a principle of international law that the recognising State is entitled to rights and subject to duties with respect to matters arising in connexion with the recognised State prior to its recognition. If a general *de facto* government, which has become extinct without having been

<sup>31</sup> This is the actual decision of the Sup. Ct. of Poland in *Republic (Poland) v. Felsenstadt* (1922), *Annual Digest*, 1919-1922, Case No. 16. See also above, p. 91, n. 59.

<sup>32</sup> [1927] P. 122, 152-3; [1927] P. 250.

<sup>33</sup> In fact, it had been endorsed, since the defence was conducted in the name of the Italian company by the Union of Soviet Socialist Republics (*ibid.*, 123).

recognised at all, can bind the State by its acts,<sup>34</sup> *a fortiori*, a government which has received subsequent recognition would be the more competent to bind the State.)

Mr. Jones holds a contrary view. He bases his argument on the case of *Andrew Allen*, which came before the Anglo-American Mixed Claims Commission in 1799, and the case concerning *Certain German Interests in Polish Upper Silesia*, decided by the Permanent Court of International Justice in 1926.<sup>35</sup> In the first case, the question was whether Allen was an American or a British national after the Declaration of Independence but prior to the recognition of 1783. Owing to conflicts of opinion, the Commission did not come to any definite conclusion.<sup>36</sup>

In the case concerning *Certain German Interests in Polish Upper Silesia*, the question was whether Poland could claim benefits from the Armistice of November 11, 1918, and the Protocol of Spa, December 1, 1918. The decision of the Permanent Court of International Justice did not bear directly upon the question of retroactivity. On the first point, it was held that 'Poland, as it was becoming constituted in the Russian territories occupied by the Central Powers, was undoubtedly not at war with Germany'.<sup>37</sup> Without war, there could be no armistice. On the second point, the Protocol only provided for reparation to Poland 'in her capacity as an integral part of the former Russian Empire', and not in her capacity as an independent State.<sup>38</sup> She would not be entitled to claim any right in the latter capacity, whether the recognition was retroactive or not.

✓ (The wide adoption of the doctrine of retroactivity by national courts is substantial proof of its acceptance as a doctrine of international law.<sup>39</sup> Professor Lauterpacht, who is opposed to this view, nevertheless agrees that the doctrine is necessary for preserving 'the legal continuity of the municipal system' of the

<sup>34</sup> Above, p. 145 *et seq.*; *Tinoco Arbitration* (1923), 1 *Reports of International Arbitral Awards*, p. 369.

<sup>35</sup> Jones, *loc. cit.*, pp. 51-2.

<sup>36</sup> Moore, *International Adjudications* (Modern Series), vol. 3, p. 238 *et seq.*

<sup>37</sup> Series A, No. 7, p. 28.

<sup>38</sup> *Ibid.* This case is fully discussed by Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 62-4.

<sup>39</sup> See Articles 7, 16 and 17 of the Resolution of the Institute of International Law, 1936 (30 A.J.I.L., 1936, Supplement, pp. 186-7).

State in which the revolution has taken place, and that the preservation of such legal continuity is 'one of the objects of international law'.<sup>40)</sup>

## § 2. THE EXTENT OF THE APPLICATION OF THE DOCTRINE

The question of the extent of the application of the doctrine may be discussed from the point of view of the time limit, and of other limitations.

As regards the time limit, several questions may arise. How far back should recognition be related? Should the court or the political department be the better judge of this question? May the political department by express terms limit the retroactive effect of its recognition? Can the previous affirmative refusal to recognise set a limit to possible retroactivity?

In the earlier American cases it was simply laid down that the recognition relates back to the 'commencement of its existence'.<sup>41</sup> The question still remains: When does the commencement take place? In *Luther v. Sagor* (1921) the court sought information from the Foreign Office, who replied that the Provisional Government which was recognised by the British Government remained in power until December 13, 1917, when it was dispersed by the Soviet Authorities.<sup>42</sup> The Trade Agreement between Great Britain and the Russian Socialist Federal Soviet Republic was signed on March 16, 1921. Bankes L.J. decided upon these facts that December 13, 1917, must be accepted as the date of the assumption of power by the Soviet Government.<sup>43</sup> In *Kolbin v. Kinnear* (1930), the recognition was dated back to 'the foundation of the Republic in 1917'.<sup>44</sup> In *Lazard Bros. and Co. v. Midland Bank, Ltd.* (1933), the House of Lords decided that the recognition should date back 'to the original establishment of Soviet rule, which was in the 1917 October Revolution'.<sup>45</sup> [A similar situation arose in Canada in

<sup>40</sup> Lauterpacht, p. 60.

<sup>41</sup> *Williams v. Bruffy* (1877), 96 U.S. 176, 186; *Underhill v. Hernandez* (1897) 168 U.S. 250, 253; *Oetjen v. Central Leather Co.* (1918), 246 U.S. 297, 302-3.

<sup>42</sup> *Luther v. Sagor* [1921], 3 K.B. 536.

<sup>43</sup> *Ibid.*, 544.

<sup>44</sup> [1930] S.C. 737, 738.

<sup>45</sup> [1933] A.C. 289, 297.

connexion with the recognition of the Estonian Soviet Socialist Republic. The letter of the Department of External Affairs which was considered in *Estonian State Cargo and Passenger Line v. S.S. Elise and Messrs. Laane and Baltster* (1948),<sup>45a</sup> stated that Canada 'does not recognise *de facto* the Republic of Estonia as constituted prior to June, 1940, . . . (and which) has ceased *de facto* to have any effective existence'. Instead the Government of the Estonian Soviet Socialist Republic was recognised 'to be the *de facto* Government of Estonia, (which) has *de facto* entered' the Soviet Union. The letter was dated January, 1947, but the court held that it was retroactively effective to the time of the establishment of the Government in June, 1940.]

As a matter of theory, upon what principle should the date of the 'commencement of existence' be determined? It is not clear from the judgments reviewed above. Scrutton L.J., in *Luther v. Sagor*, however, gave an indication of possible limitations. He rightly pointed out that recognition need not relate back 'to the first moment when some of the individuals supporting its (the *de facto* government's) cause began to resist or to attack the then established government'. Further than that he would not go.<sup>46</sup> In *White, Child and Beney Ltd. v. Simmons, same v. Eagle Star and British Dominions Insurance Co.* (1922), Roche J. seemed to have understood 'the commencement' as the moment when the revolution is 'consummated' or 'completed'.<sup>47</sup> Bankes L.J., in the same case on appeal, thought that the moment should be that in which the 'government' begins to exist.<sup>48</sup> According to these two latter views, the period in which the revolutionary government was still opposed by other parties in the civil war would not be covered by the retroactivity of recognition. On the other hand, if the revolutionary phase of the new government should be included within the period retrospectively validated, we might come to a point at which the revolutionary party consisted of nothing more than a few plotters, rioters or terrorists. It is believed that the more reasonable solution would be to reckon the commencement of the existence of a power from the moment it is possessed of a political organ-

<sup>45a</sup> [[1948] 4 D.L.R. 247; decision reversed on other grounds [1949] 2 D.L.R. 641.]

<sup>46</sup> [1921] 3 K.B. 557.

<sup>47</sup> (1922) 38 T.L.R. 367, 374.

<sup>48</sup> *Ibid.*, 616, 617.

isation such as would qualify it for recognition as a belligerent community in civil war. Such a government, even if it were never able eventually to establish itself, would be considered as capable of discharging international duties with regard to matters within its actual control.<sup>49</sup> The retroactive validation of its acts must be regarded as consistent with both principle and reason.

It has been further suggested that recognition may be related back to a date even anterior to the *de facto* existence of the recognised power. In two cases, the French courts gave effect to Soviet laws which invalidated rights acquired under laws existing prior to the Bolshevik revolution.<sup>50</sup> It does not seem to the present writer that it is the effect of recognition which has been carried beyond the date of the actual existence of the Soviet Government. The recognition merely empowers the court to give effect to legislation of the new government enacted subsequent to the commencement of its existence, and no further. The fact that such legislation is itself designed to produce retroactive effect is quite another matter.

As regards the question whether judges must follow the opinion of the executive in the determination of the date from whence retroactivity should commence, Scrutton L.J. in *Luther v. Sagor* (1921) answered emphatically in the affirmative.<sup>51</sup> In *The Jupiter* (No. 3) (1927),<sup>52</sup> and in *Lazard Bros. v. Midland Bank, Ltd.* (1933),<sup>53</sup> the courts decided on the date to which recognition should be related back upon their own knowledge, without seeking information from the Foreign Office.

The question was made an important issue in *White, Child and Beney Ltd. v. Simmons* (1922).<sup>54</sup> Roche J., reviewing the judgment of the Court of Appeal in *Luther v. Sagor*, was of the opinion that the Court of Appeal had only decided that the courts

<sup>49</sup> See below, p. 308 *et seq.* One writer thinks that the limit of retroactivity may remain undefined, and may depend in each case upon the facts of the case and the acts of the recognized power concerned (Crane, *loc. cit.*, n. 3, p. 167 above, p. 347.)

<sup>50</sup> *Ghanv, Orloff*, Trib. Civil de Melun (1926), 54 J.D.I., 1927, p. 667; *De Mayenne v. Jourel*, Trib. Civil de la Seine (1926), 55 J.D.I., 1928, p. 710, *Annual Digest*, 1927-1928, Case No. 68. [Cf., also, *Boguslawski v. Gdynia Amerika Line*, n. 12a, p. 173 above.] See Nisot, *loc. cit.*, pp. 639-40.

<sup>51</sup> [1921] 3 K.B. 557. [See, also, *Civil Air Transport Inc. v. Chennault*, n. 14, p. 120 above.]

<sup>52</sup> [1927] P. 126.

<sup>53</sup> [1933] A.C. 297. Same in *Princess Paley Olga v. Weisz* [1929] 1 K.B. 729, 732.

<sup>54</sup> (1922) 38 T.L.R. 367, 616.



should seek information from the government to ascertain the existence of a *de facto* government; the precise date of the commencement of the existence of the Soviet Government was not a subject for decision. Even if it had been decided upon, he maintained, it was not a decision of law, but of fact, and would be open to fresh consideration upon new information. In the instant case, the Foreign Office, in two letters dated June 10, and December 7, 1921, respectively, disclaimed the responsibility of expressing any opinion as to how far recognition should relate back, and observed that it was a question for the decision of the court.<sup>55</sup> Roche J., thereupon, assuming the precise date of the accession of the Soviet Government to power as undecided, held that the defendant who relied upon the act of the Soviet Government had failed to make out his case.

The judgment was reversed in the Court of Appeal, which, although it upheld the date decided upon in *Luther v. Sagor* (1921), arrived at an independent conclusion without consulting the Foreign Office.<sup>56</sup>

[In *Estonian State Cargo and Passenger Line v. S.S. Elise and Messrs. Laane and Baltster* (1948)<sup>56a</sup> the Canadian Department of External Affairs expressly declined to answer from what date it regarded the Estonian Soviet Socialist Republic as having become part of the Soviet Union. The court decided that this had taken place in June, 1940.]

American courts, in determining the crucial date of retroactivity, seem to have relied upon their own judgment, rather than upon the opinions of the State Department, although they frequently resorted to the archives of the State Department for information and facts.<sup>57</sup> They seem to have regarded the question as one of general history, which does not involve any question of policy.

<sup>55</sup> (1922) 38 T.L.R. 367, 371, 373. Similarly, in *Tallinna Laevauhisus Ltd. v. Estonian State Shipping Line* (1946), 79 Lloyd's List L.R. 246; [in the Court of Appeal, Tucker, L.J., said: 'The *de facto* recognition of the Estonian Government . . . must be regarded as having retroactive effect at least to July 21, 1940' ((1946) 80 Lloyd's List L.R. 99, 113), the date on which the Estonian legislature resolved on joining the Soviet Union (Langer, *op. cit.*, n. 28, p. 65 above, p. 263). [See also *Civil Air Transport Inc. v. Chennault*, n. 14, p. 120 above.]

<sup>56</sup> At p. 617.

<sup>56a</sup> [[1948] 4 D.L.R. 247, and see above, n. 45a.]

<sup>57</sup> *Underhill v. Hernandez* (1897), 168 U.S. 250, 253; *Oetjen v. Central Leather Co.* (1918), 246 U.S. 297, 299.

It follows from the conclusion thus arrived at, that the remaining two questions must be answered in the negative. (Since the crucial date of the commencement of the existence of the new power is a question of fact and the executive government is no better judge than the court in such matters, it would not be open to the executive government to alter that fact by its arbitrary will for the purpose of setting a limit to the retroactivity of recognition.<sup>58</sup> Under the doctrine of judicial self-limitation, the courts have refrained from deciding on 'political' matters. But to establish the fact of existence *after the recognition* has been granted cannot be said to involve any political consequence, and it may be within the competence of the court to conduct its independent investigation.)

As regards other limitations, it is believed that retroactivity is limited by the fact of the existence of the former régime. So long as that régime has not been completely displaced, it, and not the régime subsequently recognised, should be entitled to represent the State as a whole.<sup>59</sup> In *Guaranty Trust Co. of New York v. United States* (1938) the United States Supreme Court held that a notice of repudiation of liabilities given by a New York bank to the Ambassador of the Provisional Government of Russia, which was already defunct but continued to be recognised by the United States, was binding on the Russian State. The limitation period thus started to run, and the subsequently recognised government lost the right of action owing to the expiration of the period. The court said:

‘We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.’<sup>60</sup>

A similar decision by the Circuit Court of Appeals, Second Circuit, in *Lehigh Valley R. R. Co. v. State of Russia* (1927) was

<sup>58</sup> See, however, Article 7 of the Resolution of Institute of International Law, 1936: ‘Recognition *de jure* is retroactive in its effects from the date when the new State actually began to exist as an independent State. It is desirable that *this date should be definitely indicated in the act of recognition*’ (30 A.J.I.L., 1936, Supplement, p. 186. *Italics added*). *Quaere*, if different recognising States indicate different dates, does it mean that the new State ‘actually began to exist’ at different dates?

<sup>59</sup> Below, p. 296.

<sup>60</sup> (1938) 304 U.S. 126, 140-1.

cited and approved.<sup>61</sup> The judgment in *Guaranty Trust Co. of New York v. United States* was followed in *Banco de Espana v. Federal Reserve Bank of New York, same v. U.S. Lines Co., same v. Solomon*.<sup>62</sup> It was held that the sale of silver by the Republican Government of Spain transferred a valid title, and the claim of the Nationalist Government to ownership therefore failed. A similar dispute arose in the English case, *Government of Spain v. The Chancery Lane Safe Deposit, Ltd., De Reding and the Attorney-General and the State of Spain v. The same* (1939).<sup>63</sup>

It seems that, except in the last two cases, the courts have gone farther than the proposition that the effect of retroactivity is limited by the existence of the previous régime, but have maintained that the limitation is set by the continued *recognition* of an already defunct régime. Under the doctrine of judicial self-limitation this may seem inevitable. But it is believed that the continued recognition of a government which exercises no actual power does no more than prevent the subsequently recognised government from contesting in the court of the recognising State the validity it has previously attributed to the acts of the defunct government. It cannot mean, for example, that a treaty or other arrangements made with the defunct government can be held as internationally binding upon the State. Nor does the continued recognition of the defunct government set a limit to the retroactive validation of acts or laws of the new government, with regard to matters within its actual control, even though at the time such control may not have covered the entire extent of the State territory.<sup>64</sup>

Apart from the above limitations, recognition validates all the past acts of the new régime, subject, of course, to all the conditions for the application of foreign laws in national courts.

<sup>61</sup> (1938) 304 U.S. 126. See 21 F. (2d) 396, Hudson, p. 120. To the same effect, *Russian Government v. Lehigh Valley R.R. Co.* (1919), 293 F. 133, Hudson, p. 89; *Agency of Canadian Car and Foundry Co., Ltd. v. American Can Co.* (1918), 253 Fed. 152, (1919) 258 Fed. 363, *Annual Digest*, 1919-1922, Case No. 14.

<sup>62</sup> (1939) 28 F. Supp. 958, (1940) 114 F. (2d.) 438, *Annual Digest*, 1938-1940, Case No. 6.

<sup>63</sup> *The Times*, May 26, 1939; *Annual Digest*, 1941-1942, Case No. 7.

<sup>64</sup> *Dougherty v. Equitable Life Ass. Soc.* (1934), 266 N.Y. 71, Hudson, pp. 152, 153-4; *U.S. v. Belmont* (1937), 301 U.S. 324, 330; *U.S. v. Bank of N.Y. and Trust Co.* (1936), 296 U.S. 463, 478-9; *R. v. Koschikiewicz, R. v. Ulatowski* (1948), 33 Cr. App. R. 41.

Thus previous acts of the new régime which seek to be given extra-territorial effect,<sup>65</sup> or which are prejudicial to acquired rights,<sup>66</sup> or contrary to the public policy of the forum,<sup>67</sup> would not be given effect in spite of the recognition. These limitations are strictly not germane to the question of retroactivity of recognition.

### § 3. CRITICISM OF THE DOCTRINE

As has been pointed out, the doctrine of retroactivity has to its credit the advantages of ensuring legal continuity within the State in which the revolution has taken place, of promoting comity among nations, and of securing justice to individuals who have unavoidably found themselves under the rule of the *de facto* authority. It minimises the eruptive effect of the revolution and bridges the gap created by the temporary abnormal state of affairs. It makes possible the smooth working of the law as if uninterrupted by revolution.<sup>68</sup> It provides a remedy, to some extent, for the unreasonableness of ignoring the existence of powers on the ground of non-recognition.

Despite such advantages, the result of the application of the doctrine has not been altogether satisfactory. Firstly, it creates a situation little calculated to promote legal certainty. Take, for example, *Luther v. Sagor* (1921). As the case stands, the title of the original owner was divested. But had the judgment been pronounced before the recognition, that title would have been confirmed.

Secondly, the fiction of retroactivity involves the danger of putting the judiciary at variance with the political department.<sup>69</sup>

<sup>65</sup> *Barclay v. Russell* (1797), 3 Ves. Jun. 423, 424; *Lehigh Valley R.R. Co. v. State of Russia* (1927), 21 F. (2d) 396, Hudson, p. 120; *Vladikavkazsky Rly. Co. v. N.Y. Trust Co.* (1934), 263 N.Y. 369, *Annual Digest*, 1933-1934, Case No. 27.

<sup>66</sup> Resolution of Institute of International Law, 1936. Articles 7(2) and 16, 30 A.J.I.L., 1936, Supplement, p. 186; Noël-Henry, *op. cit.*, s. 156; *De Mayenne v. Joutel* (1926), 55 J.D.I., 1928, p. 710.

<sup>67</sup> See citations, above, n. 66. See also *U.S. v. Belmont* as held in the lower court, (1937) 301 U.S. 324, 327; *In re Bek Marmatscheff* (1929), *Annual Digest*, 1929-1930, Case No. 150; *Moscow Fire Ins. Co. v. Bank of N.Y. and Trust Co.* (1939), 280 N.Y. 286, 314, quoted in *U.S. v. Pink* (1941), 315 U.S. 203, 222; *Merilaid & Co. v. Chase Nat. Bank of City of N.Y.* (1947), 71 N.Y.S. (2d) 377.

<sup>68</sup> See *Dougherty v. Equitable Life Ass. Soc.* (1934), 266 N.Y. 71; 193 N.E. 897, Hudson, pp. 152, 154-5.

<sup>69</sup> Note—*Judicial Determination of the Status of Foreign Governments*—35 H.L.R., 1921-1922, p. 607.

For by relating recognition back to a time when the political department had expressly refused to grant recognition, the court would be in effect repudiating the refusal on the part of the political department.<sup>70</sup>

This unsatisfactory state of affairs is, however, not due to defects in the doctrine of retroactivity itself, but rather to the circumstances which render that doctrine necessary. (The doctrine is a fiction created to rectify the errors of another fiction, namely, the fiction that a power does not exist where it does in fact exist. So long as the latter fiction persists, the former is not only necessary, but is even salutary, despite its many shortcomings. The doctrine can, no doubt, be dispensed with, either if recognition is accorded immediately after the new power is established, or if the courts have the power to take cognizance of the fact of such existence, independently of political recognition.)

The very idea that legal effect can be given to acts of previously non-existent entities is fatal to the constitutivist contention. It substantiates the declaratory view that, recognised or not, the *de facto* power exists.<sup>71</sup> Recognition does not 'create' the legal effects,<sup>72</sup> either of the past, or of the future acts of the recognised power. They have legal effects because of the existence of that power. What recognition does, through the aid of the doctrine of retroactivity, is, internationally, to open the channel for the new power to settle questions created in the absence of diplomatic relations, and, from the point of view of municipal law, to lift the ban against taking cognizance by the courts of the existence of the new power hitherto ignored.

<sup>70</sup> See Hervey, *op. cit.*, p. 110.

<sup>71</sup> Declaratory writers maintain that retroactivity of recognition is possible only under the declaratory theory (De Visscher, *Les Gouvernements Etrangers en Justice*, 3 R.I., 1922, p. 149, at p. 151; Erich, *loc. cit.*, n. 21, p. 15 above, p. 466). For the same reason, Noël-Henry is opposed to the doctrine of retroactivity (*op. cit.*, s. 154).

<sup>72</sup> Moore is opposed to the doctrine on the ground that recognition should have no effect whatsoever (*loc. cit.*, n. 52, p. 114 above, p. 431).

## PART FOUR

### *MODES OF RECOGNITION*



## CHAPTER 14

### MODES OF RECOGNITION

THE question of what constitutes an act of recognition is a matter of great practical importance in determining whether, in a given situation, recognition has been accorded. Hall thinks that any act 'which clearly indicates intention' may be regarded as recognition.<sup>1</sup> Since it is generally agreed that recognition may be implied as well as expressed,<sup>2</sup> such a test is insufficient because it is precisely the question of knowing whether in a particular case a certain act is or is not indicative of the intention. In order that an act may be a sufficient indication of the intention to recognise, there must be something inherent in the act itself which warrants such an inference. When it can be established that certain acts are of this character, the mere fact that any such act has been done would justify the conclusion that recognition has been intended. It would not be necessary to inquire whether in so acting the intention was actually present in the mind of the actor, or whether he expected or desired such an inference to be drawn. In other words, the admission of implied recognition would require that a measure of conclusiveness be given to the outward expression, independently of the actual mental conditions, of the actor. It would be illogical to demand that in an implied recognition the intention of the recognising State should be ascertained. The fact that a certain act is being done is all the ascertainment that is necessary. To go beyond that would be the negation of the notion of implied recognition.

<sup>1</sup> Hall, p. 109.

<sup>2</sup> Hall, p. 108 *et seq.*; Oppenheim, vol. I, pp. 140-3; Moore, *Digest*, vol. I, p. 73; Anzilotti, *op. cit.*, n. 7, p. 14 above, vol. I, p. 170; Scelle, *op. cit.*, n. 20, p. 15 above, vol. I, pp. 103-4; Lawrence, *op. cit.*, n. 5, p. 14 above, p. 87; Fauchille, *op. cit.*, n. 24, p. 15 above, t. I, Pt. I, p. 325; Le Normand, *op. cit.*, n. 1, p. 14 above, p. 281; *Keith's Wheaton*, p. 56; Erich, *loc. cit.*, n. 21, p. 15 above, p. 469; Institute of International Law, Resolution of 1936, Articles 9, 14 (30 A.J.I.L., 1936, Supplement, p. 186). For the view that recognition must be express, see Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 88; Montevideo Convention, 1933, Article 7 (28 A.J.I.L., 1934, Supplement, p. 76).



The contrary argument is possible only if it be maintained that no act can be deemed to be an act of recognition which is not expressed in words. No writer has insisted upon such a narrow interpretation. Professor Lauterpacht, who is opposed to implied recognition, nevertheless regards as exceptions such acts as the conclusion of a general bilateral treaty, the formal establishment of diplomatic relations and the issuance of consular exequaturs (and, in the case of belligerency, a proclamation of neutrality or some such unequivocal act).<sup>3</sup> These acts have been sanctioned by long practice as reliable indications of recognition. A State not wishing to recognise another is free to refrain from doing any of these acts; but it would be self-contradictory, while doing the act, to deny that recognition is intended.

As we have pointed out, the notion of implied recognition is based upon the assumption that there are certain characteristics in certain classes of acts which impel the implication of recognition. But what are these characteristics? It is the purpose of this chapter to discover these characteristics, and, in the light of the finding, to determine whether various acts imply recognition.

The notion of implied recognition creates some logical difficulties for the constitutive theory. If recognition may be achieved by an act not intended by the recognising State, it would mean that the latter may find itself burdened with international obligations without its consent. Moreover, certain acts imply recognition because they presuppose the existence of the body recognised. It would be strange logic to argue that that existence can be 'created' by an act which presupposes it.

To declaratory writers, the notion of implied recognition gives rise to no special difficulty. To them, recognition is the intimation of a State's readiness to enter into full and formal political relations with another, and, at the same time, serves as evidence of the latter's existence. As a State is free to enter into various degrees of relations with other States, it may consider any such relations short of full political relations as not amounting to recognition, although it need not deny the existence of the other party as a State or government. This explains why it is possible for States to argue that, in spite of having entered into relations

<sup>3</sup> Lauterpacht pp. 405-6.

with a new entity strongly evidential of the latter's existence, no recognition has thereby been accorded. There is no contradiction on the part of a State to conduct itself upon the assumption of the existence of another, while denying it 'recognition'.<sup>4</sup>

The invitation to enter into formal political relations is naturally subject to and dependent upon the intention of the recognising State, but such an intention may be presumed in cases where the recognising State enters forthwith into the relation contemplated, such as the exchange of diplomatic representatives or the conclusion of bipartite treaties. The act in question has done what an express act of recognition would have intended to do.

We shall now consider whether the following kinds of acts may be regarded as modes of recognition, the test being whether the intention to enter into political relations is inherent in the acts themselves: express declaration; entering into bilateral treaties; accrediting and receiving of diplomatic representatives; request and issuance of consular exequaturs; participation in international conferences, multilateral treaties, and international organisations; and entering into *relations officieuses*.

## § 1. EXPRESS DECLARATIONS

An express announcement of recognition is definitive and conclusive, and removes all doubts as to the relation in which the recognising State stands towards the recognised power. Express recognition may be accomplished by direct communication to the recognised power,<sup>5</sup> or by public announcement by the recog-

<sup>4</sup> Jaffe: 'Undoubtedly recognition asserts both the facts of another nation's existence and the existence of relations with it, but non-recognition does not necessarily deny either' (*op. cit.*, n. 21, p. 15 above, p. 120). See his criticism of Baty's argument that every entry into relations with a new State constitutes recognition (*ibid.*, pp. 120-1).

<sup>5</sup> See identic notes of the British, French and German representatives to the Roumanian Government, February 20, 1880 (Moore, *Digest*, vol. I, p. 114); British note to Poland, February 26, 1919 (Lauterpacht, p. 381, n. 1); Soviet Union's communiqué to the Republic of Tuva (Taracouzio, *The Soviet Union and International Law*, 1935, p. 19, n. 23); United States recognition of Albania, 1922, Bulgaria, 1909, Egypt, 1922, Finland and Poland, 1919 (Hackworth, vol. I, pp. 198, 202, 209, 212, 217). For a summary of the American practice, see *ibid.*, pp. 167-8.

nising State,<sup>6</sup> or a notification to a third State by the recognising State,<sup>7</sup> or by agreement between two or more recognising States.<sup>8</sup> The express form of recognition makes for clarity, and brings the fact within the knowledge of the general public. Express recognition is often preferred by the recognised power as being more reassuring.<sup>9</sup> Canning, however, thought that implied recognition is 'better calculated for the advantage and dignity of the State to be recognised'.<sup>10</sup> The true reason for this preference is probably that it is less conspicuous, and therefore less likely to offend the susceptibilities of the parent or other States.<sup>11</sup>

## § 2. BILATERAL TREATIES

It is generally agreed that the conclusion of bilateral treaties constitutes recognition.<sup>12</sup> Sir William Scott held in *The Helena* (1801) that the Bey of Algiers must be regarded as a sovereign on account of his treaty relations with Great Britain.<sup>13</sup> In 1822, the United States contended that Spain had accorded recognition to her American Colonies by concluding with them 'treaties equivalent to an acknowledgement of independence'.<sup>14</sup> The International Association of the Congo was recognised by the majority of Powers by the conclusion of conventions.<sup>15</sup> The

<sup>6</sup> The United States recognised the International Association of the Congo by the declaration of April 22, 1884 (Moore, *Digest*, vol. I, p. 117); Britain recognised same in December by an exchange of declarations (*ibid.*, p. 118); The United States recognised the Baltic States in 1922, and the Czechoslovak National Council in 1918 by public announcements (Hackworth, vol. I, pp. 201, 203). [The United States adopted the same procedure to recognise Israel (18 State Dept., *Bulletin*, 1948, p. 673; 20 *ibid.*, 1949, p. 205); Korea (20 *ibid.*, 1949, pp. 59-60); Transjordan (20 *ibid.*, p. 205); Viet Nam, Laos and Cambodia (United States Information Service, *Daily Wireless Bulletin*, No. 1200, February 8, 1950). British recognition of Korea (Foreign Office, *Press Release*, January 19, 1949) and Israel (*ibid.*, January 29, 1949) was also accorded by declaration.]

<sup>7</sup> Recognition of Iceland by Denmark, 1918 (Hackworth, vol. I, p. 213).

<sup>8</sup> Below, pp. 221-2.

<sup>9</sup> Morier and Ward to Canning, April 10, 1825 (Webster, *op. cit.*, n. 66, p. 45 above, vol. I, p. 469).

<sup>10</sup> *Ibid.*, p. 291 above, p. 45, n. 66.

<sup>11</sup> Lauterpacht, pp. 378-9.

<sup>12</sup> Hershey, *Essentials of International Law and Organisation*, 1927, p. 200; Gemma, *Les Gouvernements de Fait*, 4 *Hague Recueil*, 1924, p. 297, at p. 369; Lauterpacht, p. 375; Hyde, vol. I, p. 150.

<sup>13</sup> 4 C. Rob. 3, 5.

<sup>14</sup> Moore, *Digest*, vol. I, p. 88.

<sup>15</sup> See Conventions with Germany (75 B.F.S.P., 1883-1884, p. 354); Italy (*ibid.*, p. 633); Netherlands (*ibid.*, p. 322); Denmark (76 B.F.S.P., 1884-1885, p. 586); France (*ibid.*, p. 578); Portugal (*ibid.*, p. 583); Russia (*ibid.*, p. 1010); Spain (*ibid.*, p. 575); Sweden and Norway (*ibid.*, p. 580). See also Reeves, *The Origin of the Congo Free State, Considered from the Standpoint of International Law*, 3 A.J.I.L., 1909, p. 99.

Turkish Republican Government was recognised by the United States by the signing of the treaties of August 6, 1923.<sup>16</sup> The recognition of the Soviet Government by many States was also achieved by means of bilateral conventions.<sup>17</sup>

There have been numerous cases in which States, although they have entered into agreements with new entities, have, nevertheless, insisted that no recognition had been accorded. The difficulty of a constitutivist explanation is obvious, and has been frankly admitted by Professor Lauterpacht.<sup>18</sup> His defence is that, in the absence of general recognition, a new entity may be permitted to enjoy rights 'to the extent to which they are conceded by other States'. Therefore, he maintains, the existing State or States, by entering into agreements with the new entity, admit its treaty-making capacity while refusing recognition for any other purpose.<sup>19</sup> This would mean that there can be an intermediate situation between the total absence of personality because of non-recognition and the total enjoyment of capacity in consequence of recognition. It is not clear how such an argument can be brought into harmony with the constitutive theory.

The declaratory theory is fortunately spared this dilemma. Inasmuch as recognition is regarded as an invitation to enter into political relations, there is no inconsistency in denying recognition, while entering into treaty engagements with the new entity.<sup>20</sup> The conclusion of treaties would imply recognition only when it implies, or necessitates, or is actually implemented by the establishment of political relations. In other words, very much depends upon the character of the treaty in question and the circumstances under which it is concluded.

As the term 'treaty' is here used in its generic sense, it includes

<sup>16</sup> Hackworth, vol. I, p. 312.

<sup>17</sup> Great Britain, Trade Agreement, March 16, 1921 (114 B.F.S.P., 1921, p. 373); Persia, Treaty of February 26, 1921 (*ibid.*, p. 901); Germany, Treaty of April 16, 1922 (118 B.F.S.P., 1923, p. 586); Turkey, Treaty of March 16, 1921 (*ibid.*, p. 990); Italy, Treaty of February 7, 1924 (120 B.F.S.P., 1924, p. 659); United States, exchange of notes, November 16, 1933 (Hackworth, vol. I, p. 304). For a list of other treaties, see Taracouzio, *op. cit.*, pp. 256-64. The exact date of the recognition of the Soviet Union by the United States is, however, controversial (below, pp. 195, 208, n. 88).

<sup>18</sup> Lauterpacht, p. 375, n. 1.

<sup>19</sup> *Ibid.*, p. 375. [See also, in connexion with Germany, Green, *European Recovery; Constitutional and Legal Problems*, 2 *World Affairs* (New Series), 1948, p. 373, at p. 378, and *The New Régime in Western Germany*, 3 *World Affairs* (New Series), 1949, p. 368 at p. 377.]

<sup>20</sup> See Hudson, *Recognition and Multilateral Treaties*, 23, A.J.I.L., 1929, p. 126, at p. 128.

all forms of international contractual relations. The more formal the agreement, the greater the presumption of recognition to which it would give rise. In 1865 Bismarck discreetly tried to avoid the consequence of recognising Italy by insisting upon signing a protocol instead of a treaty with her.<sup>21</sup> This distinction is, however, not always observed by other States. The British Government considered the conclusion of a trade agreement with Soviet Russia as an act of recognition, although the earlier agreement of February 12, 1920,<sup>22</sup> which in point of form belonged to the same category, was not so regarded. The recognition of the Soviet Government by the United States was effected by the least formal method of an exchange of notes.

The question whether a treaty constitutes an act of recognition may often depend upon its subject matter. Generally speaking, a treaty regulating, more or less permanently, relations of a general character between States usually constitutes an act of recognition.<sup>23</sup> A temporary local arrangement with an unrecognised body is compatible with the status of a belligerent community, and need not even presuppose the existence of a State or government. Some treaties deal with non-political matters, and they can be regarded as no more than business transactions.<sup>24</sup> But just where the line should be drawn between permanent and temporary, between general and local, between important and unimportant obligations, there does not seem to be any well-defined rule. The Soviet-Hungarian Agreement of July 28, 1920<sup>25</sup> and the Soviet-French Agreement of 1920,<sup>26</sup> contained important political clauses equivalent to a treaty of non-intervention and non-aggression. Yet neither France nor Hungary considered that recognition was implied therein.

The question may also arise: at what stage of the treaty-making process must recognition be regarded as accomplished?

<sup>21</sup> Lauterpacht, p. 375, n. 1.

<sup>22</sup> Agreement for the exchange of prisoners of war (113 B.F.S.P., 1920, p. 428). Similar agreements were entered into between the Soviet Government and other non-recognising governments (Jaffe, *op. cit.*, pp. 114-5; Taracouzio, *op. cit.*, p. 255).

<sup>23</sup> Lauterpacht, p. 406.

<sup>24</sup> Agreement between the Soviet Union and 'Manchukuo' concerning the cession of Soviet rights in the Chinese Eastern Rly., March 23, 1935, seems to belong to this category. For text of the Agreement, see 30 A.J.I.L., 1936, Supplement, p. 85. Cf. Lauterpacht, p. 376; Langer, *op. cit.*, n. 28, p. 60 above, pp. 123-4.

<sup>25</sup> Lauterpacht, p. 377.

<sup>26</sup> Jaffe, *op. cit.*, p. 115.

The exchange of ratifications is necessarily a sufficient indication of recognition.<sup>27</sup> As to stages prior to that, the indication is not so certain. The opinion has, however, been widely held that the signing of the treaty is also sufficient to indicate recognition, regardless of the eventual validity of the treaty.<sup>28</sup> Some writers have even gone so far as to assert that the mere entering into negotiations with a new entity for the purpose of concluding a treaty, and, indeed, the mere appointment of agents for that purpose, imply recognition.<sup>29</sup> The assertion is not altogether unsupported by precedents.<sup>30</sup> The logic is extremely tempting to a constitutive writer, as it is difficult to explain how it is possible to conduct negotiations with someone who does not exist.<sup>31</sup> The British Government, however, refused to regard the Soviet Government as recognised, although it had received the Soviet negotiator for the Trade Agreement. In denying recognition, it nevertheless admitted the fact that 'that which Monsieur Krassin represents in this country is a State Government of Russia'.<sup>32</sup> Likewise, President F. D. Roosevelt maintained that the official conversations between himself and M. Litvinov did not constitute recognition, which did not come about until the termination of their conversations.<sup>33</sup> But it must not be inferred from this statement that, in his opinion, the Soviet Government prior to that last moment had no existence as a government. That fact had been clearly conceded by his correspondence with M. Kalinin, President of the All Union Central Executive Committee of the Union of Soviet Socialist Republics.<sup>34</sup> This was in

<sup>27</sup> Both Bismarck and the Italian Government agreed in 1865 that the exchange of ratifications of the treaty between Italy and the States of the *Zollverein* implied recognition (*Fontes Juris Gentium*, Ser. B, sectio I, Tomus I, Pars I, 148).

<sup>28</sup> This opinion has been held by the American State Department with regard to the treaties with Turkey (Hackworth, vol. I, p. 318), China (*ibid.*), and Mexico (*ibid.*, p. 261). In this last instance, the Mexican Government expressed concurrence in this view (Lauterpacht, p. 378, n. 1). See also *Republic of China v. Merchants' Fire Ass. Corp. of N.Y.* (1929), above, p. 44, n. 65, p. 137. [See treaty recognising Philippine Republic, p. 46 above.]

<sup>29</sup> Fauchille, *op. cit.*, t. I, Pt. I, 325; Moore, *Digest*, vol. I, p. 73.

<sup>30</sup> Paraguay was recognised by the United States on April 27, 1852, by the issuance to the American chargé d'affaires at Buenos Aires of a full power to negotiate a treaty with the Paraguayan Government (Moore, *Digest*, vol. I, p. 91). similarly, United States recognition of Greece, November 7, 1837 (*ibid.*, p. 112); of Ecuador, June 15, 1838 (*ibid.*, p. 90); Opinion of State Department, 1927 (Hackworth, vol. I, p. 354).

<sup>31</sup> Lauterpacht, p. 377.

<sup>32</sup> *Luther v. Sagor* [1921], 1 K.B. 456.

<sup>33</sup> Briggs, *Law of Nations, Cases, Documents and Notes*, 1938, p. 69.

<sup>34</sup> Hackworth, vol. I, p. 303.

consonance with the general American practice.<sup>35</sup> The conclusion from these examples seems to be that, although legal capacity of the parties must be presumed by entering into negotiations, recognition cannot be achieved until the conclusion of the treaty.

Finally, it may be said that the conclusion of a bilateral treaty regulating more or less permanently matters of a general and political nature gives rise to the presumption of a State's willingness to deal with another in normal political relations. The solemnity of form and the importance of the subject matter add weight to such a presumption. The presumption is justified by the fact that the conclusion of the treaty itself is the very substance of the political relations contemplated. Agreements of a lesser formality, or dealing with temporary or local matters, which are no more than mere business transactions, or the mere entering into negotiations for such agreements, although usually sufficient to indicate that a new entity possesses capacity for international intercourse, may not imply the intention to recognise it.

### § 3. EXCHANGE OF DIPLOMATIC REPRESENTATIVES

That the exchange of diplomatic representatives constitutes recognition is in principle open to less dispute than any other form of implied recognition.<sup>36</sup> As evidence of the existence of the power recognised, it is irrefutable. There cannot be an exchange of diplomatic representatives with a foreign State without presuming its existence.<sup>37</sup> As an expression of the intention to

<sup>35</sup> See statement of State Department in *Salimoff v. Standard Oil Co. of New York* (1933), 262 N.Y. 220, 224.

<sup>36</sup> See United States recognition of Colombia, June 17, 1822 (Moore, *Digest*, vol. I, p. 90); of the Government of Buenos Aires, January 27, 1823 (*ibid.*, pp. 90-1); of Texas, March 7, 1937 (*ibid.*, p. 101); British recognition of Poland, February 26, 1919 (Lauterpacht, p. 381, n. 1, and other cases cited therein; *Fontes Juris Gentium*, Ser. B, Sectio I, Tomus I, Pars I, 144-5, 169, 171); United States recognition of the Federation of Central American States, August 4, 1824, and, later, of the separate members of the Federation and of Peru (Moore, *Digest*, vol. I, p. 92). [Similarly, American recognition of Pakistan (State Dept., *Press Release*, No. 656, August 14, 1947) and Ceylon (*ibid.*, No. 323, April 26, 1948).]

<sup>37</sup> But see the exceptional case of Cuba in 1906. Foreign diplomatic representatives continued to function, when the country was occupied and ruled by the United States (Hackworth, vol. I, pp. 149-50). [Similarly, foreign Ambassadors remained at Nanking in 1949 after that city had been occupied by Chinese communists, although the communist authority had not been recognised (Mr. Attlee, House of Commons, May 5, 1949, Parl. Debates, vol. 464, col. 1351).]

enter into political relations, the presumption is obviously similarly absolute.

There seemed to be some confusion on the part of the United States regarding its position with respect to Afghanistan in 1921. On July 26, 1921, an Afghan Mission was received by the President of the United States who, however, intimated that the creation of a diplomatic mission must be delayed. In these circumstances the State Department was uncertain whether recognition had taken place.<sup>38</sup> The confusion probably arose from the mistaken view that the recognition had been nullified by the subsequent failure to send a diplomatic mission.

Perhaps the view that the exchange of diplomatic representatives is an absolute indication of recognition does not entirely apply in the case of India. India entered into international relations with other powers after the signing of the Versailles Treaty. For many years, foreign countries have exchanged resident representatives with her, styled as 'commissioners',<sup>39</sup> who were diplomats in everything but name. Before the transfer of power on August 15, 1947, several States had exchanged regular diplomatic representatives with her.<sup>40</sup> Did India become an independent State at the time of the accrediting of the commissioners or the ambassadors? Probably the case of India is unique, and must be regarded as an exception to the general rule.<sup>41</sup>

Regarding the precise moment at which recognition may be regarded as taking place, Professor Smith has cited a minor but interesting case in which the question was whether the date of recognition should be reckoned from the dispatch of the letters of

<sup>38</sup> See contradictory views in its communications to the U.S. chargé d'affaires at Persia and to Senator Ashurst (Hackworth, vol. I, pp. 195-6).

<sup>39</sup> China and the United States had commissioners residing in New Delhi (*Indian Year Book*, 1947, p. 585). Indian representatives in China and the United States were called 'Agents General' (*ibid.*, p. 739).

<sup>40</sup> The Chinese Ambassador was appointed on February 25, 1947 (*India News*, vol. VII, No. 9, February 27, 1947); the Netherlands and Nepal decided to exchange ambassadors with India on April 17 and June 12, respectively (*ibid.*, No. 17, April 24; vol. VIII, No. 2, June 12); the Indian Ambassador to the Soviet Union was appointed on June 25 (*ibid.*, vol. VIII, No. 4, June 26); the American Ambassador to India was appointed on April 9, and presented his credentials on July 1 (*ibid.*, vol. VIII, No. 5, July 3), [the agreement to appoint an Ambassador having been reached on October 23, 1946 (Dept. of State, *Press Release*, No. 753, October 23, 1946).]

<sup>41</sup> [On September 18, 1947, the United States announced that the Consulate General at Rangoon was being raised to an Embassy (State Dept., *Press Release*, No. 749, September 18, 1947), although Burma did not become independent of Great Britain until January 4, 1948 (Burma Independence Act, 1947 (11 Geo. 6, Ch. 3, s. 1)).]



credence, or from their presentation to the head of the new State. The Queen's Advocate was unable to give a direct answer. The answer given by Professor Smith is that recognition dates 'from the first public act in which it is either expressed or necessarily implied'.<sup>42</sup>

[The relations between Great Britain and Israel throw an interesting sidelight on the effect of the accrediting of diplomatic representatives. On January 29, 1949, Great Britain 'decided to accord *de facto* recognition to the Government of Israel'.<sup>42a</sup> This was the first intimation of British recognition of the State of Israel. On May 13, 1949, it was announced that the two governments had 'agreed to raise the status of their representatives . . . to that of fully accredited Ministers'. It was pointed out at the same time that this agreement in no way affected the 'basis of the relationship between the two countries'.<sup>42b</sup> The first Israeli Minister was accredited to King George VI,<sup>42c</sup> although the State of Israel was still only recognised *de facto*.]

#### § 4. CONSULS AND EXEQUATURS

The office of a consul being local and non-political,<sup>43</sup> the appointment of a consul by a State to reside in a territory under the control of an unrecognised régime, or the acquiescence by a State of an agent of an unrecognised régime to perform consular functions within the territories of that State does not necessarily involve recognition.<sup>44</sup> This applies equally to situations where the unrecognised régime is still an insurgent community.<sup>45</sup> An

<sup>42</sup> Smith, vol. I, pp. 245-7. See also below, p. 219, n. 43.

<sup>42a</sup> [Foreign Office Press Release, January 29, 1949.]

<sup>42b</sup> [Israel Foreign Office, FO/T/150/157s4, January 6, 1950.]

<sup>42c</sup> [Israeli first book of protocol, entry No. 9.]

<sup>43</sup> Hall, pp. 371-2; Oppenheim, vol. I, pp. 743, 749; Stuart, *American Diplomatic and Consular Practice*, 1936, Ch. XVIII.

<sup>44</sup> Lauterpacht, pp. 383-4. See Mr. J. Herstlet's memorandum regarding the recognition of the Fiji Government (Smith, vol. I, pp. 250-8). As to United States practice in favour of this view, see Moore, *Digest*, vol. I, pp. 91, 132; Hackworth, vol. I, pp. 331, 332-3; vol. 4, p. 684 *et seq.* See also Harvard Research, *Consuls*, Article 6 (a) (b) (26 A.J.I.L., 1932, Supplement, p. 194).

<sup>45</sup> British consuls were sent to Buenos Aires in 1811, before the recognition of the belligerency of the latter. Note, however, that the exequatur was requested from the Spanish Government (Smith, vol. I, pp. 117-8). Appointment of consuls addressed to Buenos Aires did not take place until 1823 (*ibid.*, pp. 134-9). In June, 1810, an 'Agent for Seamen and Commerce in the Port of Buenos Aires' was appointed by the United States. In April, 1811, it was replaced by the office of a 'Consul for Buenos Aires and Ports below it on the River Plate' (Paxson, *op. cit.*, n. 3, p. 79 above, p. 109). There was, however, no intention of recognition (*ibid.*, p. 111). See also Hall, p. 377; Harvard Research, *Consuls*, *loc. cit.* p. 239. In 1912, the United States

American law expressly provides for the performance of consular functions by agents of 'Government, factions or body of insurgents within a country with which the United States is at peace, which Government, faction or body of insurgents may or may not have been recognised by the United States as a Government'.<sup>46</sup>

There is, however, a divergence of view as to the question whether the request of consular exequaturs from an unrecognised régime or the grant of consular exequaturs to appointees of such a régime constitutes recognition. Moore thinks that the act of soliciting for or receiving from the government of a certain country an exequatur for a consular officer at a particular place 'is not a conclusive recognition of such country's sovereignty over the place in question'. The request for an exequatur, he says, concerns merely the performance of consular duties by a United States officer with the permission of the authority in actual possession and indicates neither approval nor confirmation of the right of possession.<sup>47</sup> In 1911 the United States, while refusing to recognise the annexation of the Congo by Belgium, nevertheless applied for and received an exequatur from the Belgian Government for an American consular officer in Congo. The State Department said that it was 'the rule and custom' to ask consular recognition by the *de facto* authorities, 'it not being a question of *de jure* determination'.<sup>48</sup>

On the other hand, the request by one government to another to treat its officials in a manner prescribed by international law, or the assurance given to treat them in such a manner, inevitably involves an undertaking to deal with each other in a friendly way. A consular officer operating without exequatur, operates

Government remonstrated with the rebel commander in Mexico for disallowing the functioning of American consuls in his territory (Hackworth, vol. 4, pp. 684-6). For activities of United States consuls in territory under Franco during the Spanish Civil War, 1936-1939, see *ibid.*, pp. 688-9. [In May, 1949, Mr. Attlee announced that British consuls in communist-occupied China had made 'local contacts', although the communist authorities were not recognised in any way (Parl. Debates, vol. 464, col. 1351).] On many occasions, agents of insurgent bodies were allowed to perform consular functions in the United States. For the case of agents of Maximilian, see *Dana's Wheaton*, s. 76, n. 41. For more recent cases, see Hackworth, vol. 4, pp. 691-701.

<sup>46</sup> Act of June 15, 1917, 40 Stat. 226; 22 U.S.C. ss. 233, 235; Hackworth, vol. 4, p. 693.

<sup>47</sup> Moore. *Digest*, vol. 5, p. 13.

<sup>48</sup> Hackworth, vol. 4, p. 684.

only by the sufferance of the territorial authority, and not strictly according to legal right.<sup>49</sup> It is only after the granting of an exequatur that a State becomes legally bound by any international duties with respect to consuls. The majority opinion,<sup>50</sup> with the support of the overwhelming weight of practice,<sup>51</sup> points unmistakably to the conclusion that the receipt and issue of a consular exequatur imply recognition. After proclaiming a protectorate over Czechoslovakia in 1939, the German Government demanded that foreign consuls in Czechoslovakia should apply for new exequaturs from the German Government and insisted that a request for an exequatur must be regarded as tantamount to recognition of German sovereignty over the area in question. The United States Government did not contest the correctness of the German theory, and the exequatur was not issued.<sup>52</sup> The British Government applied for new exequaturs for British consuls in Prague, Bratislava and Durazzo, admitting that it implied *de facto* recognition of the existing position in

<sup>49</sup> Consular status is acquired only when a person is both commissioned and recognised (Harvard Research, *Consuls*, Article 3, *loc. cit.*, pp. 231, 240). An unrecognised government which permits consular officers without exequaturs to operate within its territory is entitled to terminate such operation whenever it pleases. See dismissal of foreign consuls from the Confederacy (■ *Fontes Juris Gentium*, Ser. B, Sectio I, Tomus I, Pars I, 146-7; Bonham, *British Consuls in the Confederacy*, 1911, pp. 18, 232).

<sup>50</sup> Hall, p. 109; Lauterpacht, pp. 384-7; Harvard Research, *Consuls*, *loc. cit.*, p. 240; *Keith's Wheaton*, p. 56; Le Normand, *op. cit.*, n. 1, p. 14 above, p. 281.

<sup>51</sup> For a review of British and American cases, see Lauterpacht, pp. 385-7. In refusing to grant an exequatur to D. C. De Forest, who applied for recognition as Consul-General of the United Provinces of South America in 1818, Secretary Adams wrote: '... the exequatur for a consul-general can obviously not be granted without recognising the authority from whom his appointment proceeds as sovereign' (Adams to the President, January 28, 1819, Moore, *Digest*, vol. I, p. 79). In the following cases recognition was accomplished by the issue of exequaturs by the United States to consuls of the new entity: Venezuela, February 25, 1835 (Moore, *Digest*, vol. I, p. 90); Uruguay, January 25, 1836 (*ibid.*, 91); Guatemala, April 5, 1844 (*ibid.*, p. 92); Belgium, January 6, 1832 (*ibid.*, p. 110). The United States refused to grant exequaturs to appointees of the following unrecognised régimes: Albanian Government, October 2, 1924 (Hackworth, vol. I, p. 282); Estonian Government, September 11, 1920 (*ibid.*, p. 330); Ecuadoran Government, July 28, 1925 (*ibid.*, p. 332). The British Foreign Secretary, Mr. Eden, stated in the House of Commons, November 8, 1937, regarding relations with Franco Spain: 'But the appointment of new Consuls with Commissions from His Majesty the King and the grant to them of an exequatur by the authorities at Salamanca would have implied a measure of recognition of these authorities' (Parl. Deb., H.C., 5th Ser., vol. 328, col. 1386). In 1924 a new Chilean Government issued exequaturs for two American Vice-Consuls, which had been requested from its predecessor. The United States Government made the reservation that the acceptance of such exequaturs did not constitute recognition (Hackworth, vol. I, p. 331).

<sup>52</sup> Hackworth, vol. 4, pp. 689-90.

those areas.<sup>53</sup> The same policy was pursued by Germany in Danzig and Poland.<sup>54</sup>

# § 5. INTERNATIONAL CONFERENCES, MULTILATERAL TREATIES, AND INTERNATIONAL ORGANISATIONS

The participation of States in international conferences, multilateral treaties and international organisations may be regarded as three successive stages in the integration of international society. The bonds between participating States become stronger as they advance from the first stage to the third. This degree of intimacy bears direct relationship with the presumption of recognition.

## *International Conferences*

Participation in an international conference is to a multilateral treaty what negotiation is to a bilateral treaty. If the mere entering into negotiations for a bilateral treaty does not constitute recognition,<sup>55</sup> for the same reason, participation in international conferences may not be considered as constituting recognition. A different view seems to be held by some writers. Fauchille, for instance, maintains that the independence of the Congo was recognised by '*son admission à la discussion et au vote de l'acte général de la conférence de Berlin, 26 février 1885*'.<sup>56</sup> Temperley adopts the date of participation in the Peace Conference as the date of the recognition of Poland, the Serb-Croat-Slovene State and Czechoslovakia.<sup>57</sup> But neither of these writers is very firm in his view. Fauchille does not seem to consider the admission into discussion as alone sufficient to indicate recognition. The participation by the Congo in the General Act really amounted to the signing of a multilateral treaty which may be regarded as constituting recognition.<sup>58</sup> Temperley, too, is not definite. He is not at all indisposed to accept other dates, such as the dates of individual acts of States

<sup>53</sup> Parl. Deb., H.C., 5th Ser., vol. 347, cols. 961, 962; vol. 348, col. 1786; vol. 352, col. 1755.

<sup>54</sup> Hackworth, vol. 4, pp. 690-1.

<sup>55</sup> Above, pp. 194-6.

<sup>56</sup> Fauchille, *op. cit.*, t. I, Pt. I, p. 325.

<sup>57</sup> Temperley, *History of the Peace Conference of Paris*, 1920, vol. 5, pp. 158-9.

<sup>58</sup> For the view that the recognition of the Congo was accomplished through bilateral conventions, see above, p. 192.

or the date of the signing of the Treaty of June 28, 1919, as possible alternatives.

The preponderant view is that the mere participation in an international conference by an unrecognised body does not warrant the implication of its recognition by other participants.<sup>59</sup> The practice of States, especially the United States, is decidedly in its favour. In participating in numerous international conferences in which unrecognised governments were represented, the United States consistently maintained its position that no recognition was involved.<sup>60</sup> She has, however, been uncertain whether it was safe to come to the conference without reservation. On one occasion she hastened to make a statement that no recognition was implied in participating in the conference.<sup>61</sup> On another occasion she took the view that no reservation was necessary, save in the case where it was necessary to sign documents together with unrecognised governments.<sup>62</sup> It seems to show that in the opinion of the United States Government, the signature of the documents, such as a general act, of a conference is equivalent to signing a treaty, so far as the question of recognition is concerned. Greater caution was therefore exercised where the international conference resulted in the conclusion of multipartite treaties.

Another distinction discernible in the American practice is that greater caution has been exercised in the case where the

<sup>59</sup> Lauterpacht, p. 380; Hudson, *loc. cit.*, n. 20, above, p. 129.

<sup>60</sup> In the following international conferences, the United States took part along with the Soviet Union, then still unrecognised by the United States: (a) Universal Postal Congress, with Convention signed on August 28, 1924 (L.N.T.S.XL, 19), (b) European Conference on the Measurement of Vessels Employed in Inland Navigation, with convention signed on November 27, 1925 (L.N.T.S.LXVII, 63), (c) International Sanitary Conference, with Convention signed on June 21, 1926 (L.N.T.S.LXXXVIII, 229), (d) Economic Conference at Geneva, 1927 (Hudson, *loc. cit.*, p. 129), (e) League of Nations Preparatory Commission of the Disarmament Conference, March, 1928 (*ibid.*), (f) Meeting of Government Experts on Double Taxation and Tax Evasion, October, 1928 (*ibid.*).

In the following international conferences, the United States took part along with other unrecognised governments: (a) Child Welfare Congress, 1924, with the unrecognised Chilean Government (Hackworth, vol. I, pp. 346-7), (b) Bolivar Congress, 1926, with the unrecognised Nicaraguan and Ecuadoran Governments (*ibid.*, p. 347).

Colombia was represented in the Fourth International Conference of American States, in 1910, along with Panama which she did not recognise, and several conventions were signed by both (Hudson, *loc. cit.*, pp. 129-30).

<sup>61</sup> The United States delegate was instructed to use an informal note in addressing the unrecognised Chilean Government when the Child Welfare Congress took place at Santiago, 1924 (Hackworth, vol. I, p. 347).

<sup>62</sup> Sec. Kellogg to South at the Bolivar Congress, June 16, 1926 (*ibid.*).

non-recognising State and the unrecognised power stand towards each other in relations closer than those of mere fellow-participants. Thus, in the case of the Child Welfare Congress 1924 reservations were considered necessary, probably because the unrecognised government was the government of the host State.<sup>63</sup> When the United States intended to play host to the Universal Postal Congress of 1929, the Secretary of State declared that no invitation could be extended to the Soviet Union.<sup>64</sup> Such a precaution was obviously unnecessary, seeing that the United States had already taken part in inviting the Soviet Union to adhere to the Kellogg Pact in the previous year.<sup>65</sup> In fact the precedent does not seem to have been followed. In 1933 President Roosevelt extended an invitation to the Soviet Union to take part in the Disarmament Conference and the International Monetary and Economic Conference.<sup>66</sup>

[In 1945, however, no invitation to attend the United Nations Conference on International Organisation at San Francisco was sent to Poland. By the Protocol of the Yalta Conference, 1945,<sup>66a</sup> the Governments of the Soviet Union, the United Kingdom and the United States resolved upon the reorganisation of the then existing Polish Provisional Government. This reorganisation had not been effected by the time of the Conference, and the existing Government was still unrecognised by the United Kingdom, the United States and other participants. After debate it was decided that no invitation should be sent to the Polish Government.<sup>66b</sup> Space was, however, left in the text of the Charter for a Polish signature to be appended.<sup>66c</sup> After this Government had been recognised by the United Kingdom and the United States, the Polish representative signed the Charter.<sup>66d</sup>]

(As a matter of theory, there is no reason why co-participation in an international conference should imply recognition.) It may raise some difficulty, perhaps, from the constitutivist point of

<sup>63</sup> Hackworth, vol. I, pp. 346-7.

<sup>64</sup> *Ibid.*, p. 347. The Congress was eventually held in London, both the United States and the Soviet Union taking part (L.N.T.S., CII, 245).

<sup>65</sup> Hudson, *loc. cit.*, pp. 126-8.

<sup>66</sup> Hackworth, vol. I, p. 346, n.

<sup>66a</sup> [U.N. Doc. 30, DC/5 (I), April 27, 1945, pp. 13-17 (UNCIO Documents, vol. 5, pp. 93-97).]

<sup>66b</sup> [Cmd. 7088 (1947).]

<sup>66c</sup> [U.N. Doc. 1213, ST/23, June 28, 1945, p. 1 (UNCIO Documents, vol. 5, p. 305).]

<sup>66d</sup> [Goodrich and Hambro, *Charter of the United Nations*, 1949, p. 124; Kelsen, *Law of the United Nations*, 1950, p. 8.]

view, since to admit the representative capacity of the agent is hardly compatible with the denial of the existence of the principal. Even so, this consideration need not have arisen in the case of conferences of a technical or economic nature, in which participants need not be sovereign States in the strict sense of the word. From the point of view of the declaratory theory, participation in an international conference is at most a preliminary step in exploring the possibilities of closer relations. It cannot itself be conclusive as an invitation to enter into such relations. Therefore no recognition can be implied in the mere participation by unrecognised powers in international conferences. The fear of the implication would needlessly impair the usefulness of the conferences.<sup>67</sup>

While reservations by non-recognising States participating in international conferences may often seem tautologous, it would be justifiable, however, for them to prevent unrecognised bodies from being included in a conference or to abstain from participating in it themselves, if that unrecognised body had objectively no existence as a State, or if it proved exceedingly distasteful.<sup>68</sup> The object is not so much to prevent the implication of recognition, as to protest against being ranged with non-sovereign bodies or to show undisguised displeasure towards the unrecognised body.

### *Multilateral Treaties*

(Participation in multilateral treaties may assume either of the two forms: signature or adherence. It is believed that the simultaneous signing of a treaty gives rise to a stronger presumption of recognition than the subsequent adherence to it.<sup>69</sup>)

(In the question of adherence, a distinction must be drawn between 'open' and 'closed' conventions. Adherence to open conventions is entirely beyond the control of other participating States. It is unfair to assume that recognition can be effected by an unrecognised body through its own unilateral action.<sup>70</sup>) The United States did not consider the adherence of the Soviet

<sup>67</sup> Hudson, *loc. cit.*, p. 129; Lauterpacht, p. 380.

<sup>68</sup> The United States boycotted the Genoa Conference of 1922 on this ground (Hackworth, vol. I, p. 301).

<sup>69</sup> See this distinction made by Sec. Kellogg (Hackworth, vol. I, p. 354).

<sup>70</sup> *Ibid.* See the adherence of the 'Slovak State' on June 17, 1939, to the Universal Postal Convention of 1934 (Langer, *op. cit.*, p. 60 above, p. 233).

Government to the International Office of Public Hygiene in 1926<sup>71</sup> or to the Kellogg Pact in 1928<sup>72</sup> as implying recognition by other participants. It was the view of the United States that this position is unaffected by the fact that a signatory State happens to act as depository of instruments of adherence.<sup>73</sup> A depository State is bound to receive impartially the adherence of actual States unrecognised by it. But it would probably be within its rights to reject the adherence of a body with no semblance of statehood. This interpretation must be placed upon the recommendations of the Advisory Committee of the League of Nations on June 3, 1933, in which it was suggested that the depository States for open conventions should consult the contracting parties whether to accept the adherence of 'Manchukuo', and that the Secretary-General of the League could not accept any accession from 'Manchukuo' to conventions concluded under the auspices of the League.<sup>74</sup>

(Since, in closed conventions, adherence cannot be effected without the consent of the original signatories, the presumption for recognition is consequently stronger than in the case of adherence to open conventions.) Thus, Armenia's claim that by accession to the Treaty of Sèvres, August 10, 1920, she was impliedly recognised by all the other signatories was not questioned by the League Committee on the Admission of New Members.<sup>75</sup> The League of Nations Advisory Committee, in view of the non-recognition of 'Manchukuo', advised the Assembly not to allow adherence to closed conventions by 'Manchukuo'.<sup>76</sup> The United States, however, consented to the adherence of the Soviet Government to the Treaty of February 9, 1920, concerning

<sup>71</sup> Hackworth, vol. I, p. 352.

<sup>72</sup> *Ibid.*, p. 353. But see also, below, pp. 207-8, 210. In an instruction of July 26, 1931, to the United States Minister in Switzerland, the Acting Secretary of State stated that the implication of recognition by the adherence of an unrecognised régime to an open convention 'appears to be too tenuous to warrant even an explanatory declaration or reservation'. But immediately following, he made a somewhat contradictory remark that, 'when the United States signs a convention which is left open for subsequent signature', a reservation on the question of recognition would be necessary (U.S. For. Rel. 1931 (I) 674).

<sup>73</sup> Hackworth, vol. I, p. 354.

<sup>74</sup> *Ibid.*, p. 336.

<sup>75</sup> L.N. Records of 1st Assembly, 1920, Plenary Meetings, 164. Armenia acceded to that treaty by signing a protocol with other signatories (113 B.F.S.P., 1920, p. 873).

<sup>76</sup> Hackworth, vol. I, p. 336.



Spitzbergen, claiming that no recognition could be implied therein.<sup>77</sup>

In so far as adherence to closed conventions is subject to the assent of all signatories, it stands to reason that such adherence should be governed by the rules regarding the simultaneous signing of treaties by unrecognised régimes. This applies to cases where, although the convention in question is an open one, the signatories have positively given their assent to the adherence,<sup>78</sup> and also to cases where a treaty to which the unrecognised régime is a party is adhered to subsequently by the non-recognising State.<sup>79</sup>

✓ (How far, then, does simultaneous signing of a multilateral treaty imply recognition? To answer this question distinctions must be drawn between political and non-political treaties, between treaties requiring and those not requiring positive governmental cooperation, and between treaties signed with and without reservations.)

— In modern times numerous multilateral treaties dealing with cultural, economic and technical matters have been concluded in which the sovereign aspect of the signatories is insignificant. Parties to such a treaty need not be States,<sup>80</sup> and States not recognising each other need feel no embarrassment in signing the same document.<sup>81</sup> Sometimes non-recognising States may feel it desirable to make a statement to the effect that their signature

<sup>77</sup> Hackworth, vol. I, pp. 348-9. It may be noted that, although the Treaty is in the nature of an open convention, the Soviet Government was precluded from adhering to it by Article 10 of the Treaty (113 B.F.S.P., 1920, p. 794). [Article 10 did not forbid Soviet adherence, it merely required the prior recognition of a Russian Government.]

<sup>78</sup> *E.g.*, the adherence of the Soviet Union to the Kellogg Pact, 1928 (Hudson, *loc. cit.*, p. 126 *et seq.*).

<sup>79</sup> See, however, the letter of the United States Acting Secretary of State to Wilson, July 26, 1931, in which it was stated that no recognition would result from the 'signature of or adherence to a multilateral treaty to which the unrecognised régime was a party' (U.S. For. Rel. 1931 (I) 674).

<sup>80</sup> *E.g.*, in the Universal Postal Convention, June 28, 1929 (Hudson, *International Legislation*, vol. 4, p. 2870) and the Convention for the Protection of Literary and Artistic Works, June 2, 1928 (*ibid.*, p. 2463), many of the signatories were dependencies.

<sup>81</sup> Colombia signed with Panama, whom she did not recognise, the Convention on Literary and Artistic Copyright, August 11, 1910 (*Treaties*, vol. 3, p. 2925), the Convention on Inventions, Patents, Designs and Industrial Models, August 20, 1910 (*ibid.*, p. 2930), and the Convention on Protection of Trade Marks, August 20, 1910 (*ibid.*, p. 2935).

would not prejudice the political relations between the parties.<sup>82</sup> In most cases in which the United States signed multilateral treaties along with the then unrecognised Soviet Government, she took care to make reservations.<sup>83</sup> In view of the nature of the treaties, which would not in any case affect the political relations between signatories, reservations of this kind are legally tautologous. The United States on several occasions admitted such redundancy.<sup>84</sup> On later occasions, this practice of making reservations was abandoned altogether.<sup>85</sup> It does not appear that other governments under similar circumstances thought it necessary to make similar reservations. As recognition concerns political relations, it cannot be effected by the signing of non-political conventions, whether with or without reservation.

The signing of a multilateral political treaty, on the other hand, may be presumed to constitute recognition, and the presumption depends upon the scope and importance of the matters regulated. A comprehensive treaty which necessitates the plenitude of relations would, no doubt, be regarded as warranting the inference of recognition.<sup>86</sup> The difficulty arises only when the relations contemplated in the treaty are such that, although important, they do not require the fulness of diplomatic intercourse, such as the Kellogg Pact. Can recognition be inferred from its signature? The United States answered in the negative.<sup>87</sup>

<sup>82</sup> A statement to that effect was made by the President of the Conference on the occasions of the signing of the Scheldt Convention, 1863, and the International Telegraphic Convention, 1865 (Lauterpacht, p. 374, n. 3; *Fontes Juris Gentium*, Ser. B, Sectio I, Tomus I, Pars I, 156-8). A similar statement was inserted in the Final Act adopted on November 2, 1865, by the European Danube Commission (*ibid.*).

<sup>83</sup> For a list of such reservations, see Lauterpacht, p. 372, n. 2; Hackworth, vol. I, pp. 347-50.

<sup>84</sup> E.g., see Kellogg to Burton, April 16, 1925 (Hackworth, vol. I, p. 348); Acting Sec. of State to Wilson, July 26, 1931 (U.S. For. Rel. 1931 (I) 674).

<sup>85</sup> Reservations were dispensed with in signing the Telecommunications Convention, 1932, and the International Air Sanitary Convention, 1932 (Hackworth, vol. I, pp. 350-2), the Convention on the Régime of the Straits, 1923 (*ibid.*, p. 348), and the Universal Postal Conventions of 1924 and 1929 (Hudson, *loc. cit.*, n. 19, above, p. 130). In signing the convention on the Suppression of Counterfeiting of Currency, 1929, the failure to make reservations was, however, an omission (U.S. For. Rel., 1931 (I), 674).

<sup>86</sup> The signing of the Peace Treaties of 1919 by Czechoslovakia and Poland was considered as recognition of them by other signatories (Temperley, *loc. cit.*; Lawrence, *op. cit.*, p. 87; *Keith's Wheaton*, p. 56).

<sup>87</sup> Hackworth, vol. I, p. 363. Sir Arnold McNair thinks that participation in multilateral law-making treaties need not imply recognition, because it does not involve diplomatic contact (*The Functions and Differing Legal Character of Treaties*, 11 B.Y.I.L., 1930, p. 100, at p. 109).

International writers disagree over the significance of the Soviet adherence.<sup>88</sup> Professor Hudson's reasoning seems to be basically sound. He says:

'The Government of the United States has not recognised the Government of the Union of Socialist Soviet Republics. This does not mean that in the view of the Government of the United States, the Government of the Union of Socialist Soviet Republics does not exist. . . . Nor does it mean, necessarily, that the two governments can have no relations with each other. It means, rather, that their relations are not those which members of the international community ordinarily have, and are not conducted according to established usages and general principles of international law.'<sup>89</sup>

To remove any doubt as to whether the totality of relations is implied, it would be best for the treaty to contain an express stipulation to that effect.<sup>90</sup>

A further test has been suggested for determining whether a particular multilateral treaty implies recognition. Where a treaty provides for 'reciprocal affirmative duties and obligations' and requires 'affirmative inter-governmental cooperation and dealings', recognition is thought to be implied.<sup>91</sup> On this ground, the participation in the Kellogg Pact was thought not to imply recognition.<sup>92</sup> Non-recognition is held to be incompatible with the undertaking of positive obligations.<sup>93</sup> [Nevertheless, despite the adherence of Israel to the Charter of the United Nations, Egypt and the other Arab members of the United Nations still maintained that they had not recognised the State of Israel.]

A few words must be said with regard to the nature of a reservation made upon signing a multilateral treaty to which an

<sup>88</sup> See Briggs, *op. cit.*, p. 68.

<sup>89</sup> Hudson, *loc. cit.*, p. 127.

<sup>90</sup> *E.g.*, Preamble to the Treaty of Paris, March 30, 1856, in which the independence of Turkey was guaranteed (46 B.F.S.P., 1855-1856, p. 8). In the Protocol of Conferences, January 24, 1871, relative to the revision of the Treaty of Paris, 1856, the delegates recorded their recognition of the German Empire (61 B.F.S.P., 1870-1871, p. 1199). Similarly, Article VII, Treaty of November 15, 1831, regarding independence of Belgium (Hertslet, *Map of Europe by Treaty*, 1875, vol. 2, p. 863).

<sup>91</sup> Opinion of the Legal Adviser of the State Department, March 15, 1932 (Hackworth, vol. 1, pp. 351-2).

<sup>92</sup> Hudson, *loc. cit.*, p. 132.

<sup>93</sup> For cases in which it was held that the operation of a treaty requiring positive action must be suspended when the parties were not recognising each other, see above, p. 104.

unrecognised régime is a party. Does it have the effect of denying the legal existence of the unrecognised régime? Does it have the effect of excluding the unrecognised régime from the legal relations established by the treaty, so far as the non-recognising State is concerned? Or, does it merely suspend the operation of the provisions between the non-recognising and the unrecognised parties? Or, again, does it merely indicate that, apart from the legal relations entered into in consequence of the signing of the treaty, the parties in question do not consider themselves in any way bound to each other?

The suggestion that a State can sign a treaty with someone who does not exist is absurd and does not bear examination. The existence of an unrecognised participant to a treaty cannot be denied by means of a reservation, at least, where the obligations under the treaty are of a political nature.

It cannot even be said that, by means of a reservation, a State can exclude an unrecognised party from the legal relationship set up by the treaty.<sup>94</sup> The most that a reservation can do is to suspend the operation of the treaty as between the parties not recognising each other. The legal relationship is, however, established by the signature of it. This appears to be the proper interpretation of the reservation made by the United States to the Sanitary Convention of June 21, 1926. The reservation reads:

‘They (*i.e.*, the Plenipotentiaries of the United States) further declare that the participation of the United States of America in the International Sanitary Convention of this date *does not involve any contractual obligation* on the part of the United States to a signatory or adhering power represented by a régime or entity which the United States does not recognise as representing the Government of that power, *until it is represented by a Government recognised by the United States.*’<sup>95</sup>

The second italicised passage clearly indicates that only the operation of the treaty was temporarily suppressed. The legal relationship would automatically come into operation once the obstacle to it was removed. The original signature must be

<sup>94</sup> See, however, Lauterpacht, pp. 371-2.

<sup>95</sup> Hudson, *International Legislation*, vol. 3, p. 1975. Italics added. Almost identical reservations were made by the United States upon signing the Convention on Narcotic Drugs, July 13, 1931 (*ibid.*, vol. 5, p. 1078).

considered valid, and as not requiring renewal, should recognition be finally accorded.

So long as reservations are permissible in international law, a signatory to a multilateral treaty would, in general, be free to fix whatever limits to the application of the treaty he might see fit. But in some cases this right of self-determination is difficult to maintain. For instance, supposing a signatory to the Optional Clause of the Statute of the International Court of Justice inserts a reservation similar to the one quoted above, can that signatory object to the compulsory jurisdiction of the Court upon complaints by a régime which it does not recognise? <sup>96</sup> Considering especially the case of a State whose Government was recognised by other signatories at the time of its signing the Optional Clause, but not at the time of the litigation, can the non-recognising State object to the exercise of jurisdiction on the ground of non-recognition? It should be thought that if a State is entitled to do so, it would be opening a convenient door to treaty evasion.

Although the United States made no reservation to the Kellogg Pact, she consistently maintained the view that its adherence by the Soviet Government did not constitute recognition of the latter by the United States. On December 2, 1929, however, the United States addressed identic notes to Russia and China, reminding them of their obligations under the Pact.<sup>97</sup> The examples of the Optional Clause and the Kellogg Pact strongly affirm the conclusion that, although positive cooperative action is not possible between signatories or adherents of political multilateral treaties who do not recognise each other,<sup>98</sup> the fact

<sup>96</sup> The question is answered in the negative by Williams (*Recognition*, 15 *Grotius Transactions*, 1930, p. 53, at p. 77).

<sup>97</sup> *Documents on International Affairs*, 1929, p. 274 *et seq.* The Soviet Government, in reply, expressed surprise at the American note, as there were no 'diplomatic relations' between the two States. It also rejected the notes of Roumania and Egypt on the same ground, although Roumania had signed and ratified the Litvinov Protocol.

<sup>98</sup> However, such positive actions may be demanded from the participants of the League of Nations and the United Nations. Article I (1) of the Covenant expressly provides that accession should be 'without reservation'. See, however, the special cases of Colombia and Switzerland (Hudson, *Membership in the League of Nations*, 18 *A.J.I.L.*, 1924, p. 436, at pp. 438-40). The Charter of the United Nations makes no express provision on this point. But Article 4 (1) makes membership conditional upon acceptance of the obligations under the Charter, which would be interpreted as meaning 'unconditional acceptance'. See Goodrich and Hambro, *Charter of the United Nations*, 1949, p. 132.

of non-recognition does not liberate them from the legal obligations under the treaties.

### International Organisations

(International organisations are, in general, the outcome of international treaties: treaties of a special kind which create, not contractual, but corporate relations among signatories.<sup>99</sup> They are usually closed conventions, adherence being only by the consent of existing signatories.<sup>1</sup> Like multilateral treaties, international organisations may be non-political, in which case, political independence may not be a requisite qualification for membership.<sup>2</sup> Participation in these organisations would not involve recognition.<sup>3</sup>)

Whether admission to the League amounted to recognition is a controversy which cannot be terminated by the extinction of the organisation. It promises to revive whenever a new international organisation is to be set up. From a strictly formal point of view, this question need not have arisen at all under the Covenant. By a literal interpretation of Article 1 (2) of the Covenant, a community might have been admitted to the League which did not possess political sovereignty, so long as it answered to the description of 'fully self-governing State, dominion or

<sup>99</sup> Not all signatories to the treaty creating an international organisation need become members of the organisation. Thus the defeated Central Powers, who signed the Peace Treaties, did not become at once members of the League of Nations. On the other hand, membership of the League may be acquired without adherence to the Peace Treaties, as in the case of Mexico (Hudson, *Mexico's Admission to Membership in the League of Nations*, 26 A.J.I.L., 1932, p. 114, at p. 117; same, *Membership in the League of Nations*, 18 A.J.I.L., 1924, p. 436, at pp. 442-3).

<sup>1</sup> [As regards the United Nations, see Green, *Membership in the United Nations*, 2 *Current Legal Problems*, 1949, p. 258.] For variations of this rule, see Jenks, *Some Constitutional Problems of International Organisations*, 22 B.Y.I.L., 1945, p. 11, at pp. 20-2.

<sup>2</sup> See, for instance, Article 10 (5) of Convention of June 7, 1905, on the International Institute of Agriculture (*Treaties*, vol. 2, p. 2143); Article 8, Convention of June 28, 1929, on the Universal Postal Union (Hudson, *International Legislation*, vol. 4, p. 2873). Colonies took part in the International Telecommunication Union, Convention of December 9, 1932 (*Treaties*, vol. 4, p. 5379), and may become 'associate members' of the World Health Organisation (Sharp, *The New World Health Organisation*, 41 A.J.I.L., 1947, p. 509, at p. 515). On December 16, 1920, Georgia and the Baltic States, though unqualified for membership of the League, were admitted to the technical organisations (L.o.N., *Records of 1st Assembly, Plenary Meetings*, 634).

<sup>3</sup> See report of L.o.N. Advisory Committee, quoted in Willoughby, *Sino-Japanese Controversy and the League of Nations*, 1935, p. 524.

colony'.<sup>4</sup> However, as a matter of practice, the qualification of 'recognition' constituted a weighty consideration when the question of admission of new members was raised in the First Assembly of the League.

(The question presented to the League was whether recognition by all or any of the members was a condition precedent to the admission of a new member. However, in the course of discussion, the issue which occupied the minds of the members turned out to be whether admission would automatically imply recognition of the new member by those members who had not hitherto recognised it. The latter question was in fact a corollary of the former: if recognition was a necessary condition for admission, then the League in admitting a new member must be presumed to have satisfied itself that this condition had been fulfilled.<sup>5</sup> Certainly, the condition of recognition was not to be found anywhere in the Covenant.<sup>6</sup>) It is true that, among the questionnaires put to the Sub-Committee on the Admission of New Members, there was one which inquired: 'Was the Government applying for admission recognised *de jure* or *de facto* and by which State?'<sup>7</sup> But this was only for purposes of reference, and was never regarded as a decisive factor in determining the question of admissibility.<sup>8</sup>

It has been argued that, even though there was nothing in the Covenant requiring recognition as a condition for admission, yet, having regard to the special relations between members of the League, admission must have implied recognition.<sup>9</sup> This may not

<sup>4</sup> Fauchille, *op. cit.*, t. I, Pt. I, p. 333. For the meaning of the terms 'State, dominion or colony', see Friedlander, *The Admission of States to the League of Nations*, 9 B.Y.I.L., 1928, p. 84, at p. 85; see also Schwarzenberger, *The League of Nations and World Order*, 1936, pp. 31 *et seq.*, 84 *et seq.*

<sup>5</sup> See Rougier, *La Première Assemblée de la Société des Nations*, 28 R.G.D.I.P., 1921, p. 197, at p. 233 *et seq.*

<sup>6</sup> See opinion of Lord Robert Cecil in 5th Committee of the 1st Assembly of the League (L.O.N., *Records of the 1st Assembly, Committees*, vol. 2, p. 157) and the contrary view of Politis (*ibid.*). The opinion of the Committee of Jurists was divided (*ibid.*, pp. 160-1).

<sup>7</sup> *Ibid.*, p. 159.

<sup>8</sup> Of the new members admitted during the 1st Assembly, only Bulgaria was recognised by all the Powers (L.O.N., *Records of the 1st Assembly, Plenary Meetings*, p. 598). Costa Rica was only recognised by 13 members (*ibid.*, p. 606); and the position of Albania was doubtful (*ibid.*, p. 669). In presenting the report of the 5th Committee, its Chairman said that the committee did not allow itself to be hampered by the legal considerations of recognition (*ibid.*, p. 561).

<sup>9</sup> Such, in effect, was the opinion of the Belgian delegate, M. Poulet (*ibid.*, pp. 623-4). Also Scelle, *L'Admission des Nouveaux Membres de la Société des Nations*, 28 R.G.D.I.P., 1921, p. 122, at pp. 127-8; Fauchille, *op. cit.*, t. I, Pt. I, pp. 334-5.

be entirely true, but the First Assembly of the League seemed to regard some measure of recognition as prerequisite for admission.<sup>10</sup>

(In view of the special obligations under the Covenant, it is difficult to imagine how membership could have been compatible with the denial of existence as a State (the status of the British Dominions and India being excepted). A constitutive writer must necessarily admit that membership of the League had to be conditioned upon recognition, for without recognition there would be no capacity for these obligations.) This logic was not, however, always followed in practice. In several cases members have insisted upon the right to withhold recognition from a new member.<sup>12</sup>

There are further difficulties for the constitutive doctrine. If admission amounted to recognition, would that recognition be considered withdrawn when a State ceased to be a member? What would have been the position of a State, a member of the League, whose government was overthrown and whose new government was not recognised by all or by a certain number of the members? As regards the first question, it is believed that until the League had acquired a universality which would identify it with the Family of Nations, the withdrawal or expulsion from it could not produce the effect of extinguishing the existence of State personality.<sup>13</sup> As to the second question, if a State represented by a régime not recognised by all the members of the League was not qualified to apply for admission, it would seem that, by analogy, a new régime in a member State would also not have been qualified

<sup>10</sup> Armenia was rejected on the grounds both of doubts as to her frontiers and of the lack of recognition (Rougier, *loc. cit.*, pp. 235-6).

<sup>11</sup> Kelsen, *loc. cit.*, n. 8, p. 213 above, p. 614; Anzilotti, *op. cit.*, vol. I, p. 172. See also the decision of the Com. Trib. of Luxemburg in *U.S.S.R. v. Luxemburg and Saar Co.*, *Annual Digest*, 1935-1937, Case No. 33. Fauchille (*op. cit.*, t. I, Pt. I, p. 334) and Williams (*loc. cit.*, p. 62) also took this view. [In his *Law of the United Nations*, 1950, Professor Kelsen suggests that the admission of a non-recognised State to the United Nations would imply recognition (p. 79). However, the United States supported the admission of Transjordan before according recognition, and in the opinion of some of the States who had not previously recognised her, the admission of Israel did not effect her recognition. However, on August 19, 1949, Canada informed the Government of Israel that she considered 'the vote cast by the Canadian Delegate in the General Assembly on May 11, in favour of Israel's admission to the United Nations, as having implied full recognition by the Government of Canada of the State of Israel' (Israeli Foreign Office letter FO/I/(60), November 18, 1949).]

<sup>12</sup> Lauterpacht, p. 401; Hudson, *op. cit.*, 18 A.J.I.L., 1924, pp. 438-9.

<sup>13</sup> Erich, *loc. cit.*, pp. 497-8.



to represent the State in the League unless and until it had been recognised. This would mean that, in the absence of recognition by other members, a State would have lost its right of membership for reasons not contemplated by the Covenant. Such a result would also be in conflict with the principle that the international obligations of a State are unaffected by a change of its government. The point is thought to have arisen when in 1928 the Nationalist Government superseded the old government in China. But there was no discussion on this point at the League, there being no rival claimant to dispute the right of representation.<sup>14</sup>

The admission of a new member to the League had to involve certain, though not all, relations between the old and the new members. But, according to the declaratory theory, the maintenance of such partial relations need not involve the consequence of recognition, not even by those members who had voted for the admission.<sup>15</sup> The relationship between members not recognising each other would be exactly the same as that between members having severed diplomatic relations. Members were bound by the Covenant to maintain certain defined relations with each other irrespective of their extra-League relations.<sup>16</sup>

<sup>14</sup> Williams, *loc. cit.*, p. 71. [The problem has also arisen in connexion with China's status as a permanent member of the Security Council of the United Nations; the Soviet Union contended in 1950 that only the representative of the Communist régime in China, which had at that time only been recognised by the Soviet Union, the United Kingdom, and a minority of the members of the Security Council, was entitled to take his seat as a member of the Council. When the resolution to unseat the Nationalist representative failed, the Soviet delegation boycotted the meetings of the Council, and of all other bodies in which Nationalist China was represented. In an attempt to overcome the *impasse* thus created, the Secretary-General of the United Nations issued a Memorandum on 'Legal Aspects of Representation in the United Nations' (U.N. Press Release, PM/1704, March 8, 1950). In this, after rejecting the idea that there was any duty to recognise a new state or government, it was pointed out that representation in an organ of the United Nations depends upon a collective act, while recognition is individual, and 'it would appear to be legally inadmissible to condition the (former) by a requirement that (it) be preceded by individual recognition.' It was further contended that representation did not involve recognition.]

<sup>15</sup> Erich, *loc. cit.*, pp. 494-8. The question whether admission to the League amounted to a recognition binding upon all members does not arise under the declaratory theory. A member was naturally bound by all the decisions of the League taken in accordance with the prescribed procedure, including the decision to admit new members. An old member was, therefore, bound to accept the membership of the new member and to treat it as such, even though it may have voted against the admission. Kelsen's theory that recognition was binding upon all members because they had transferred to the Assembly the competence to recognise is ingenious, but unfounded in the Covenant (Kelsen, *loc. cit.*, p. 614). [Despite its admittance to the United Nations, Egypt refuses to recognise Israel.]

<sup>16</sup> See the case of severance of diplomatic relations between Uruguay and the Soviet Union, December, 1935 (Hyde, *Freedom to Withdraw Diplomatic Relations*, 30 A.J.I.L., 1936, p. 284).

Normally, the maintenance of full diplomatic relations would be in consonance with the spirit, if not the letter, of common membership under the Covenant.

The question of recognition under the Charter of the United Nations is not very different. One point which is obviously an improvement upon the Covenant is that the qualification for admission is now limited to 'States' instead of the former 'States, dominions and colonies'.<sup>17</sup> Although several of its members, at the time of their admission, could hardly answer the description of the word 'State',<sup>18</sup> the text of the Charter leaves no doubt that in future no entities other than States may be admitted.<sup>19</sup> [This prerequisite of statehood was emphasised by the International Court of Justice in its Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations* (1948).<sup>20</sup>] Admission to the United Nations would be a positive proof of the possession of the quality of statehood, though it does not mean that other members are obliged to enter into relations with it to the full extent,<sup>21</sup> [and the admission of Israel to the United Nations while not recognised by all members, suggests that existing members do not regard membership of the United Nations as automatically entailing the recognition of an unrecognised State, although Canada announced, in August,

<sup>17</sup> Article 4 (1) of the Charter.

<sup>18</sup> E.g., India, Byelorussia, Ukraine, the Philippine Commonwealth, Lebanon and Syria (Goodrich and Hambro, *op. cit.*, n. 66d, p. 203 above, pp. 122-5).

<sup>19</sup> Poland opposed the admission of Transjordan to the United Nations on the ground that the sovereign independence of the applicant was doubtful (U.N. Security Council, *Official Records*, 1st Year, 2nd Series, Supplement No. 4, pp. 70-1). [The Soviet Union objected to the admission of Ceylon on similar grounds (Security Council, *Official Records*, Third Year, No. 105; Green, *loc. cit.*, p. 272), while the United States declined to support the application of the Mongolian People's Republic until that State could prove it was completely independent (United States Information Service, *Daily Wireless Bulletin*, No. 1003, June 13, 1949).]

<sup>20</sup> [I.C.J. Reports, 1948, p. 57, at p. 62.]

<sup>21</sup> The requirement of recognition was not mentioned among the principles laid down by the Committee on the Admission of New Members (Supplement, No. 4, p. 55). The application of Transjordan, Eire, Portugal and Siam were opposed by the Soviet Union on the ground that these countries had no diplomatic relations with her (*ibid.*, pp. 70, 72, 74, 77), and she later vetoed their admission (*ibid.*, No. 5, pp. 139-40). This ground was opposed by the United States (*ibid.*, No. 4, p. 55) [who had supported the application of Transjordan, although she had not accorded *de jure* recognition to that State, and did not regard her vote as having done so. For a discussion of all these cases see Green, *loc. cit.*; and for the legality of the Soviet attitude see *Conditions of Admission of a State to Membership in the United Nations* (1948), I.C.J. Reports, 1948, p. 57.]

1949, that she regarded her vote in favour of Israel's admission to the United Nations 'as having implied full recognition by the Government of Canada of the State of Israel'.<sup>21a]</sup>

### § 6. *Relations Officieuses*

As, by definition, only formal political relations between States constitute recognition, the maintenance of relations which are officious and informal does not carry with it the consequences of recognition.<sup>22</sup> Such *relations officieuses* may be maintained between two States, or between a State and a body which falls short of statehood, such as a belligerent community. The question of the existence of statehood is therefore totally irrelevant.

*Relations officieuses* are usually restricted to matters of immediate concern, such as the temporary security of the subjects and property of the non-recognising State,<sup>23</sup> and, in the case of civil war, the insistence on the rights of neutrality.<sup>24</sup> A broader view was taken by Jefferson whose instruction of November 7, 1792, to the American Minister at Paris, stated that, with a Government *de facto*, matters like the reforming of unfriendly restrictions on commerce and navigation might be taken up.<sup>25</sup> It

<sup>21a</sup> [Israeli Foreign Office letter, FO/I/(60), November 18, 1949.]

<sup>22</sup> United States agents had been in informal intercourse with the French Government before the independence of the United States was recognised (Moore, *Digest*, vol. I, p. 206). In an instruction to the United States Minister to Venezuela, Sec. Evarts said that pending formal recognition 'the diplomatic fiction of "officious" intercourse, or "unofficial" action is elastic enough to admit of continuing ordinary intercourse' (*ibid.*, p. 151). For other instances see Hackworth, vol. I, p. 327; Briggs, *Relations Officieuses and Intent to Recognise: British Recognition of Franco*, 34 A.J.I.L., 1940, p. 47, at p. 52 *et seq.*

<sup>23</sup> See Note of November 26, 1861, from Earl Russell to Mr. Adams (Moore, *Digest*, vol. I, p. 209), claiming the right to demand redress and protection from the *de facto* authority. Requests for protection were also made by the United States to factional authorities in Haiti in 1824 (*ibid.*, pp. 216-7), in Bolivia, 1899 (*ibid.*, p. 243), in Colombia, 1900 (*ibid.*, p. 139), and in Mexico, 1912 (Hackworth, vol. I, pp. 360-2).

<sup>24</sup> Seward took the view that when belligerency is recognised, intercourse can take place between agents in reference to the terms of the belligerency (Wharton, *Digest*, vol. I, p. 514). During the Brazilian naval revolt, 1893-4, foreign governments were constantly in touch with the insurgents on the conduct of hostilities (Moore, *Digest*, vol. 2, p. 1113 *et seq.*). For United States communications with Franco, see Hackworth, vol. I, pp. 362-3.

<sup>25</sup> Moore, *Digest*, vol. I, p. 120.

is not uncommon for important commercial and even political matters to be dealt with in this informal manner.<sup>26</sup>

The commonest method of establishing *relations officieuses* is by sending and receiving non-diplomatic agents. Some of these agents are commercial in character and may be assimilated to consuls.<sup>27</sup> Many are entrusted with political functions and are styled 'agents', 'commissioners', 'political agents', or even 'diplomatic agents'.<sup>28</sup> The fact that an agent is styled 'diplomatic' does not affect the question of recognition, so long as the intercourse remains unofficial and informal.

Apart from the appointment of agents, informal intercourse may be maintained through the retention of the diplomatic and consular officers of the non-recognising State in the territory of the new entity.<sup>29</sup> During the French revolutions in 1792 and

<sup>26</sup> Thus, in 1919, Britain and the Allied Powers cooperated with the unrecognised Provisional Government of Northern Russia (*The Annette: The Dora* [1919]. P. 105). A trade agreement was entered into between Britain and the Spanish Nationalists although Britain had not recognised the belligerency of the insurgents (Parl. Deb., H.C., 5th Ser., vol. 328, col. 1386; Briggs, *loc. cit.*, p. 52). Important political discussions through informal means took place between the United States and Mexico regarding the recognition of the Huerta and Obregón Governments (Hackworth, vol. I, pp. 257-8, 262). See also below, n. 28.

<sup>27</sup> See above, p. 198 *et seq.*

<sup>28</sup> United States agents were sent to various European capitals after the Declaration of Independence (Moore, *Digest*, vol. I, p. 206). The United States sent an agent to the regency at Madrid in 1813 (*ibid.*, p. 133); received the agent of Buenos Aires in 1817 (Paxson, *op. cit.*, n. 3, p. 79 above, p. 152); received an agent from the Calderon Government of Peru in 1881 (Wharton, *Digest*, vol. I, p. 550); sent John Lind as 'personal representative' of President Wilson to Mexico in 1913 (Hackworth, vol. I, p. 259). An American Diplomatic Agent and Consul-General resided at Cairo before the recognition of Egypt by the United States (*ibid.*, p. 209). Both the United States and China exchanged Commissioners with India prior to her independence (above, p. 197). The British Government received Confederate agents, arguing that it was customary both in England and France to receive such persons (Moore, *Digest*, vol. I, p. 209). This right to receive agents from belligerent communities was emphatically stressed by the British Government in the controversy over *The Trent* case (Earl Russell to Lord Lyons, January 23, 1862, reproduced in Bernard, *Neutrality of Great Britain during the American Civil War*, 1870, p. 215 *et seq.*). Great Britain exchanged agents with the Spanish Nationalists in November, 1937, and they were later mutually accorded certain diplomatic privileges. It was maintained by the British Government that no recognition was involved (April 4, 1938, Parl. Deb., H.C., 5th ser., vol. 334, col. 4). The view has been upheld in *Luther v. Sagor* [1921], 1 K.B. 456, 477.

<sup>29</sup> Moore, *Digest*, vol. I, p. 235. In the *Hopkins Claim* (1926) it was held that the embassies and consulates of the troubled State might likewise continue their routine work in behalf of whoever was in control of the Foreign Office (Opinions of Commissioners, 1927, p. 46). In 1792, however, the new capacity of the French Minister was refused recognition by Britain, when he transferred his allegiance to the Republican Government (Smith, vol. I, p. 87 *et seq.*), though he continued to be treated informally. [Foreign ambassadors and consular officials in 1949 remained in that part of China which was occupied by the communists, and apparently unofficial contacts were made

1851, the American ministers were instructed to enter into informal relations with the *de facto* authorities.<sup>30</sup> Informal relations were maintained by the United States with the Supreme Junta in Spain, 1809,<sup>31</sup> and with the revolutionary party in Ecuador, 1895.<sup>32</sup> In 1855, during the non-recognition by the United States of the Rivas-Walker Government in Nicaragua, the American Minister was instructed to abstain from official intercourse with that government, but not to forfeit all the immunities of a Minister.<sup>33</sup>

We have seen that, despite the public character of the agent who is charged with the conduct of *relations officieuses*, the question of recognition is not affected by their activities, unless these partake of a formal and official character. Just what act is to be considered formal or official is a question that admits of no simple answer. American practice reveals considerable lack of consistency. It may perhaps be stated that the delivery of a congratulatory speech or document to the new head of State or government almost certainly implies recognition.<sup>34</sup> On the other hand, the surrender of criminals<sup>35</sup> or the conduct of business with the *de facto* authorities in the capacity of the *doyen* of the diplomatic corps<sup>36</sup> is believed to imply no recognition. The State Department has issued conflicting instructions as regards business transactions<sup>37</sup> and the travel visa issued by unrecognised authorities.<sup>38</sup> Between the two extremes, the action of the

(Mr. Attlee, House of Commons, May 5, 1949, Parl. Debates, vol. 464, col. 1351). United States consular officials who had remained in communist China despite the non-recognition of the communist Government, were recalled in January, 1950, after 'Chinese Communist authorities . . . (had) ordered the taking over of United States consular property . . . and . . . seized that property in defiance of protests by the United States Government. . . . The United States Government takes an extremely serious view of this situation, which constitutes a flagrant violation of our treaty rights and of the most elementary standards of international usage and custom' (United States Information Service, *Daily Wireless Bulletin*, No. 1180, January 16, 1950).]

<sup>30</sup> Moore, *Digest*, vol. I, pp. 120, 125-6.

<sup>31</sup> *Ibid.*, p. 132.

<sup>32</sup> *Ibid.*, p. 156.

<sup>33</sup> *Ibid.*, p. 140-1. [In 1949 both Great Britain and the United States sought to retain their diplomatic privileges, although not recognising the communist authorities in China (*The Times*, June 14, 1949), and see n. 29 above.]

<sup>34</sup> E.g., action of United States Minister in France, 1848 (Moore, *Digest*, vol. I, p. 124) and in Roumania, 1881 (*ibid.*, p. 115).

<sup>35</sup> Hall, p. 109; Moore, *Digest*, vol. I, p. 206; Hackworth, vol. 4, p. 37. *Contra*, Le Normand, *op. cit.*, p. 281.

<sup>36</sup> Hackworth, vol. I, p. 344.

<sup>37</sup> *Ibid.*, pp. 354-5.

<sup>38</sup> Contrast cases cited *ibid.*, pp. 338-40, 342.

United States has generally been guided by caution and prudence, often at the cost of consistency. Thus, Secretary Seward, in refusing to receive the agents of Maximilian, declared that it was the 'fixed habit' of the United States to hold no 'unofficial or private intercourse with persons with whom it cannot hold official intercourse'.<sup>39</sup> Yet, according to Moore, the reception of the delegates of the South African Republics in 1900 by the American President and the Secretary of State, constituted only an 'act falling short of recognition'.<sup>40</sup> As to the reception of the American diplomatic representatives by the heads of the unrecognised régimes, in some cases attendance at such receptions was discouraged,<sup>41</sup> but in others it was sought for.<sup>42</sup> The State Department has also not been uniform in its rulings as to whether the fact that an agent is armed with letters of credence impels the presumption of the official character of his acts.<sup>43</sup> One of the common methods of indicating the informal character of the relations is to avoid written documents,<sup>44</sup> and, whenever written communication is necessary, to avoid addressing the addressee by title,<sup>45</sup> and to mark the document 'personal'.<sup>46</sup>

The above review of American practice illustrates how very

<sup>39</sup> *Dana's Wheaton*, § 76, n. 41.

<sup>40</sup> Moore, *Digest*, vol. I, pp. 212-4.

<sup>41</sup> In 1851, the United States and Swiss Ministers abstained from the weekly receptions of the French President, Louis Napoleon (*ibid.*, p. 125). In 1936, the United States and Mexican Ministers abstained from the reception of the Provisional President Franco of Paraguay (Hackworth, vol. I, p. 270).

<sup>42</sup> See cases of the Provisional Government of Spain, 1931 (*ibid.*, p. 295), and the Tuan Chi-jui Government in China, 1924 (*ibid.*, pp. 316-7). The United States chargé d'affaires in Mexico was instructed to attend General Obregón's inauguration as President in his private capacity (*ibid.*, p. 345). The American Minister to Venezuela was reproved for failing to attend a banquet given by President Blanco in 1879 (Moore, *Digest*, vol. I, p. 151).

<sup>43</sup> Such letters of credence were issued to United States agents to Buenos Aires (1810), Caracas (1812), and Greece (1825), in the absence of recognition (*ibid.*, p. 215). In 1849, Dudley Mann was furnished with a full power to negotiate and conclude a commercial Convention with Hungary (*ibid.*, pp. 218-9). On the other hand, the issue of letters of credence was refused to the United States agent to Haiti, 1824, and Paraguay, 1845. In the former case, the Secretary of State said that the issue of such letters of credence 'would be an explicit acknowledgment' of the government (*ibid.*, pp. 216-7). Moore (*ibid.*, p. 235) thinks that there is no recognition so long as there is no formal presentation of credentials. [The receipt of the letters of credence carried by the first Israeli Minister to Great Britain did not change the nature of the *de facto* recognition of Israel accorded by Great Britain (see p. 198 above).]

<sup>44</sup> Hackworth, vol. I, p. 342.

<sup>45</sup> *Ibid.*, pp. 244, 306. See conflicting instructions, *ibid.*, p. 343. Also below, pp. 220-1.

<sup>46</sup> *Ibid.*, pp. 244, 258, 282, 343.

thin is the line between official and officious acts. Sometimes it is almost obliterated. In 1885 the American Minister was instructed to maintain 'the most friendly and intimate relations' with the *de facto* government of Peru, which should be 'as full and direct as though the formality of recognition had taken place'.<sup>47</sup> In dealing with the Soviet Government the United States performed many acts which, under other circumstances, would have been deemed to imply recognition.<sup>48</sup>

Let us now consider the question of addressing an unrecognised authority by title. Phillimore thinks that the assumption of title is a matter within the competence of every sovereign, yet other countries may refuse to acknowledge it if it affects their own rights.<sup>49</sup> As a title usually indicates a certain status or capacity claimed or pretended to by the bearer, to address him by that title would be an admission of that claim. It is true that non-recognition of title does not affect the actual possession of power. Yet, as an expression of disapproval and as a measure of chastisement, the purpose of non-recognition would be defeated by admitting a title which embodies the claim in question. A number of States in order to avoid addressing the King of Italy as 'Emperor of Abyssinia' went so far as to suspend diplomatic relations with him.<sup>50</sup> The United States Department of State decided in 1937 that General Franco should be addressed simply as 'His Excellency, General Franco'.<sup>51</sup> The question of title also arises in connexion with recognition by means of the conclusion of bilateral treaties and the accrediting and acceptance of diplomatic representatives. There would be no recognition unless the parties have been properly named by their respective titles. Early in 1825, in connexion with the conclusion of a treaty with Brazil, Canning wrote that the signing of a treaty in which the plenipotentiary of the new State 'is designated in the Preamble to such treaty as the Plenipotentiary of that New State described by its proper style (whether monarchy or republic), was in itself an effective and valid recognition of that State by His Majesty'.<sup>52</sup>

<sup>47</sup> Moore, *Digest*, vol. I, pp. 159-60.

<sup>48</sup> See Hackworth, vol. I, pp. 301-3.

<sup>49</sup> Phillimore, *op. cit.*, n. 21, p. 15 above, vol. 2, p. 40 *et seq.*

<sup>50</sup> Lauterpacht, p. 392; see also Langer, *op. cit.*, p. 150 *et seq.*

<sup>51</sup> Hackworth, vol. I, p. 363.

<sup>52</sup> Webster, *op. cit.*, vol. I, p. 291.

The recognition of the Italian conquest of Abyssinia by many States was effected by accrediting diplomatic representatives to King Victor Emmanuel as 'King of Italy and Emperor of Ethiopia'.<sup>53</sup> The example of Italy is especially instructive, because diplomatic relations between the Italian Government, as such, and other States had always existed. The only sign of the recognition of the conquest was indicated by the recognition of the title. On the other hand, it might be arguable whether acquiescence by other powers in the use of a certain title by agents of an unrecognised régime, such as the title used by the Italian delegate who signed the Montreux Convention of May 8, 1937, constitutes recognition.<sup>54</sup> The situation may be likened to the case of adherence to a multilateral treaty by unrecognised régimes, over which other signatories can have no control.

## § 7. COLLECTIVE RECOGNITION

As the decision to establish political relations with a new régime is primarily a matter of individual choice, recognition, in the sense of expressing the intention to enter into such relations, would not, in principle, require collectivity of action. Yet, in view of the fact that States often accord treatment to new entities, not by the criterion of actual existence, but by that of recognition, and in order that the fact of existence may be fairly judged, unprejudiced by selfish considerations of policy, it is highly desirable that recognition be effected through collective action.<sup>55</sup>

Collective recognition may take the form of an express declaration by the recognising States,<sup>56</sup> an express stipulation in a treaty

<sup>53</sup> *Survey of International Affairs*, 1938 (I), pp. 144-52, 162, 163; Lauterpacht, p. 392. n. 2; Langer, *op. cit.*, p. 150 *et seq.*

<sup>54</sup> Lauterpacht, p. 392.

<sup>55</sup> Lauterpacht, pp. 67-9, 165-74, 253-5; Jessup, *A Modern Law of Nations*, 1948, ch. 3. [Cx., however, Memorandum of Secretary-General of United Nations on 'Legal Aspects of Representation in the United Nations', U.N. Press Release, PM/1704, March 8, 1950.]

<sup>56</sup> *E.g.*, the recognition of Albania by the Conference of Ambassadors in 1921 (Hackworth, vol. I, p. 196); of Estonia and Latvia by the Supreme Council of the Allied Powers in 1921 (114 B.F.S.P., 1921, pp. 558-9); of Prince Charles of Roumania by Britain, France and Germany in 1880 (Moore, *Digest*, vol. I, p. 114); of the Saavedra Government in Bolivia by the United States, Argentina and Brazil in 1921 (Hackworth, vol. I, p. 225); of the Toro Junta in Bolivia by numerous American States in 1936 (*ibid.*, p. 227). Cf. Lauterpacht, pp. 68-9, 166-8.



between recognising States,<sup>57</sup> or the admission of the new body to participate in international treaties.<sup>58</sup> Recognition after consultation among recognising States<sup>59</sup> may be considered as collective in substance, if not in form.

It has been suggested that a general international organisation, such as the League of Nations and the United Nations, would present itself as a convenient instrument for the collectivisation of recognition.<sup>60</sup> No doubt, these organisations have contributed, and will continue to contribute, to the development of collective recognition as a normal procedure. By making admission conditional upon the possession of statehood, the United Nations has made its membership a conclusive proof of the existence of a body as a State. Though there is nothing compulsory in either the Covenant or the Charter for members to enter into full political relations with one another, the obligations under them have made such relations in the long run inevitable, [and the absence of diplomatic relations has been used by the Soviet Union to oppose the admission of certain States<sup>61</sup>]. When the United Nations shall have attained complete universality, the notion of 'recognition' will wither away, and membership of the United Nations will be the sole standard of relations between States.<sup>62</sup>

Apart from admission to membership, the League and the United Nations provide other means for testing the existence of a State. Under Article 17 of the Covenant, as well as under Articles 2 (6), 32, 35 (2) and 93 (2) of the Charter, the international

<sup>57</sup> France and Russia by the Treaty of 1807 recognised the Napoleonic satellites (De Martens, R.T., vol. 8 (1803-8), p. 641). The following were recognised by States signing the Treaty of Berlin, 1878: Bulgaria (Article I), Montenegro (Article 26), Serbia (Article 34), and Roumania (Article 43) (69 B.F.S.P., 1877-1878, pp. 751, 758, 761, 763). Russia and Poland recognised Ukraine, White Russia and Ruthenia by the Treaty of Peace, March 18, 1921 (114 B.F.S.P., 1921, p. 917).

<sup>58</sup> Above, p. 204 *et seq.*

<sup>59</sup> For example, the recognition of Finland by the United States, Great Britain, France and Japan, 1919 (Hackworth, vol. I, p. 212); recognition of the Busch Junta in Bolivia by the United States, Brazil, Argentina, Peru and Chile, 1937 (*ibid.*, p. 228). See also Lauterpacht, pp. 69, 167-8.

<sup>60</sup> Lauterpacht, pp. 67-8, 168-9; Jessup, *op. cit.*, p. 45 *et seq.*

<sup>61</sup> See n. 21, p. 215 above.

<sup>62</sup> This view has been expressed in connexion with the League (Friedlander, *loc. cit.*, pp. 99-100). On the occasion of the admission of Iraq to the League, October 3, 1932, the League Assembly declared that 'By this act Iraq assumes her rank among the sovereign and independent States' (Records of the 13th Ord. Sess. of Ass., 6th Meeting, L.o.N. Off. J. Sp. Suppl. 104).

organisation claims to exercise jurisdiction over States who are non-members. In such a case, it would be necessary to determine whether the party in question is or is not a State.<sup>63</sup> Likewise, the question may also arise under Article 35 of the Statute of the Permanent Court of International Justice and Articles 4 (3) and 35 (2) of the Statute of the International Court of Justice. It is also conceivable that the judgment upon a dispute between two States may depend upon the decision whether a third body constitutes a State. In the performance of these functions, neither the international organisation nor the international court creates the State. They merely declare as existent what in fact exists,<sup>64</sup> and upon the basis of such existence, decide upon the rights and duties of the parties under international law. Indeed, they do not perform the act of 'recognition'; they do, however, make recognition more certain and, in the long run, inevitable, by insisting that rights of States and governments should be respected, whether they are recognised or not.

<sup>63</sup> The question whether the Indonesian Republic was a State and whether its dispute with the Netherlands might be considered as a matter within the 'domestic jurisdiction' of a State under Article 2 (7) of the Charter was hotly debated in the Security Council in July and August, 1947. (See 2 *International Organisation*, 1948, p. 80 *et seq.*) [This debate took place after the United States had extended *de facto* recognition to the Republic of Indonesia (*The Times*, April 18, 1947). *De jure* recognition was not extended until after the formal transfer of power from the Netherlands to the United States of Indonesia (United States Information Service, *Daily Wireless Bulletin*, Nos. 1166, 1167, December 28, 29, 1949).]

<sup>64</sup> *Tinoco Arbitration* (1923) 1 *Reports of International Arbitral Awards*, 369, at p. 381.

## CHAPTER 15

### RECOGNITION: BY WHOM DETERMINABLE<sup>1</sup>

THE question which of the several organs of government should be entrusted with the function of deciding upon matters of recognition is primarily one of municipal, rather than international law. The question is, however, of interest from the international point of view, because there is the necessity of determining whether, in a given case, a State has, through its appropriate organ, accorded its recognition, and what consequences are to be attributed to it.

#### § 1. ORGAN FOR RECOGNITION

Recognition, being an act of initiating or maintaining certain relations with other countries, naturally falls within the function of that organ which is charged with the conduct of foreign relations. In countries having federal constitutions, the matter is complicated by the distribution of foreign relations powers between the national authorities and the constituent members. In some of these constitutions, member States are allowed a limited right of treaty-making.<sup>2</sup> By the amendment to the constitution of the Soviet Union in February, 1944, Republics of the Union are permitted to enter into 'direct relations with foreign States'.<sup>3</sup> It may be a grave question whether, in exercising such foreign relations powers, the member States can perform an act of recognition under international law.

The Constitution of the United States has made it quite clear that the power of foreign relations is in the sole charge of the

<sup>1</sup> Unless otherwise indicated, the discussions in this section generally apply to the recognition of belligerency. See also below, pp. 393-4.

<sup>2</sup> E.g., Article 9 of the Swiss Constitution of 1848 (Rappard, *Source Book on European Governments*, 1937, Pt. I, p. 21); Article 78 (2) of the German Constitution of 1919 (112 B.F.S.P., 1919, p. 1076).

<sup>3</sup> New Article 18 (a) (Dobrin, *Soviet Federalism and the Principle of Double Subordination*, 30 *Grotius Transactions*, 1944, p. 260, at p. 261).

national government.<sup>4</sup> This view has been consistently upheld by American courts.<sup>5</sup>

To which branch of the national government, then, should the power of recognition be attributed? In answering this question it is useful to bear in mind that international law is concerned, not with the analysis of the part played by a department of government in the formation of a policy of recognition, but only with the determination of the agency whose act may be internationally effective as an act of recognition. Thus, a resolution of the legislature urging a particular course of action,<sup>6</sup> or opinions expressed in intercommunications between various organs of the government,<sup>7</sup> important as they may be in deciding upon the course actually adopted, have no international significance and cannot be relied upon for the fixing of international responsibilities.

Since recognition is understood as an act of initiating or maintaining certain relations with foreign States, it is generally considered to belong to the sphere of the political departments responsible for the conduct of foreign relations.<sup>8</sup> But which of the political departments: the legislative or the executive? In the United Kingdom, the conduct of foreign affairs is a royal prerogative, formally exercised by the Crown independently of

<sup>4</sup> Article I, Sect. VIII (3) (11) (15); Article II, Sect. II (1) (2), Sect. III. See Corwin, *The Constitution and What It means Today*, 1946, p. 214 *et seq.*

<sup>5</sup> *Cohens v. Virginia* (1821), 6 Wheat. 264, 413-4; *Knox v. Lee, Parker v. Davis* (1870), 12 Wall. 457, 555; *Chae Chan Ping v. U.S.* (1888), 130 U.S. 581, 604; *Nishimura Ekiu v. U.S.* (1891), 142 U.S. 651, 659; *Fong Yue Ting v. U.S.* (1892), 149 U.S. 698, 711; *U.S. v. Curtiss-Wright Export Corp. et al.* (1936), 299 U.S. 304, 316-7; *U.S. v. Belmont* (1937), 301 U.S. 324, 330. See also Wright, *Control of American Foreign Relations*, 1922, pp. 129 *et seq.*, 263 *et seq.*; Willoughby, *Constitutional Law of the United States*, 1929, vol. I, pp. 90, 306-7, 513-6.

<sup>6</sup> See below, p. 226 *et seq.*

<sup>7</sup> Regarding communications between the President and Congress, see note from Sec. Webster to Hulsemann, Austrian chargé d'affaires, December 21, 1850 (Moore, *Digest*, vol. I, p. 224). As to communications between the Government and its courts, see McNair, *Judicial Recognition of States and Governments and the Immunity of Public Ships*, 2 B.Y.I.L., 1921-1922, pp. 57-8; Lyons, *Conclusiveness of the Foreign Office Certificate*, 23 B.Y.I.L., 1946, p. 240; the same, *The Conclusiveness of the 'Suggestion' and Certificate of the American State Department*, 24 *ibid.*, 1947, p. 116; the same, *Conclusiveness of Statements of the Executive: Continental and Latin-American Practice*, 25 *ibid.*, 1948, p. 180.

<sup>8</sup> Le Normand, *op. cit.*, n. 1, p. 14 above, p. 277; Hyde, vol. I, s. 41, pp. 156-7; Despagne et de Boeck, *Cours de Droit International Public*, 1910, s. 83; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts*, 25 Col. L.R., 1925, p. 544, at pp. 547-8; Finkelstein, *Judicial Self-Limitation*, 37 H.L.R., 1923-1924, p. 338, at p. 349; Weston, *Political Questions*, 38 H.L.R., 1924-1925, p. 296, at p. 318. For judicial authorities, see below, n. 41.

Parliament.<sup>9</sup> The power of the French President is substantially the same, though in theory less absolute.<sup>10</sup> In Switzerland, however, the power of recognition is vested in the Federal Council in conjunction with the Federal Assembly.<sup>11</sup>

In the United States the President is the sole representative organ of the State. The President, in exercise of his power of sending and receiving diplomatic and consular representatives, the negotiation and conclusion of treaties, the announcement of policies, the proclamation of neutrality, and the conduct of war, performs the function of recognition.<sup>12</sup> It is true that, in matters of appointment and treaty-making, his action is subject to approval by the Senate. Yet, as the Senate has control over the eventual validity of the treaty, and not its signing, it cannot undo the effect of recognition after a treaty has been signed. The Executive, moreover, can in certain cases, bypass the Senate by resorting to 'executive agreements', or other modes of recognition which require no senatorial cooperation. The amount of legislative control over recognition is dependent, therefore, to a great extent, upon the mode in which recognition is accorded.<sup>13</sup>

The United States Congress sought, on several occasions, to influence the recognition policy of the United States, and even to implement that policy by its direct action. It passed resolutions expressing sympathy with the new-born States or governments,<sup>14</sup> exerted pressure upon the Executive by means of passing appro-

<sup>9</sup> Phillips, *Principles of English Law and the Constitution*, 1939, p. 237; Wright, *op. cit.*, p. 135.

<sup>10</sup> See Articles 8 (1) and 9 of the Constitutional Law of July 16, 1875 (printed in Rappard, *op. cit.*, Pt. II, p. 13), and Article 31 of the Constitution of October 27, 1946 (2 Peaslee, *Constitution of Nations*, 1950, p. 10). See also Noël-Henry, *op. cit.*, s. 79.

<sup>11</sup> Articles 85 (5) (6), 102 (7) (8) (9) (11) of the Constitution (Rappard, *op. cit.*, Pt. I, p. 48). Bluntschli thinks that in Switzerland the power of recognition belongs exclusively to the Chambers (Bluntschli, *op. cit.*, n. 10, p. 14 above, s. 122; also, Le Normand, *op. cit.*, p. 277).

<sup>12</sup> Article II, Section II (1) (2), Sect. III of the Constitution. See also Garner, *Executive Discretion in the Conduct of Foreign Relations*, 31 A.J.I.L., 1937, p. 289.

<sup>13</sup> Noël-Henry, *loc. cit.*, n. 32, p. 110 above, p. 209. Moore believes that had Dudley Mann succeeded in officially presenting himself to the Hungarian Authorities in 1849, it would have been sufficient to constitute recognition, before any action could have been taken by Congress (Moore, *Digest*, vol. I, p. 246).

<sup>14</sup> See joint resolution of December 10, 1811, regarding Latin American Republics (Berdahl, *The Power of Recognition*, 14 A.J.I.L., 1920, p. 519, at p. 525); resolution of April 20, 1898, regarding Cuba (*ibid.*, p. 537; Wright, *op. cit.*, p. 271); the joint resolution of February 29, 1912, regarding China (Hackworth, vol. I, p. 164).

priation bills for the expenses of diplomatic representatives to be appointed to the new powers,<sup>15</sup> and assumed the rôle of 'directing' and 'empowering' the Executive to extend recognition.<sup>16</sup>

The fight for congressional initiative in the matter of recognition was conducted by Henry Clay in the early nineteenth century. He strongly urged that Congress should have the international competence to grant recognition by means of passing an act to regulate trade with the new power.<sup>17</sup> The result of his efforts was however very limited.<sup>18</sup>

Only on three subsequent occasions were there attempts to accord recognition by the action of the legislature. Resolutions were introduced in 1898 and in 1913 declaring that Cuba<sup>19</sup> and the republican government of China,<sup>20</sup> respectively, were 'hereby recognised' by the United States. In introducing the latter resolution, Senator Bacon claimed that recognition is 'exclusively for the determination of Congress in its capacity as the law-making power'.<sup>21</sup> On December 19, 1864, a resolution was adopted in the House of Representatives which declared: 'That Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well as in the recognition of new Powers as in other matters.'<sup>22</sup>

Clay's view was, however, not without support outside the United States Congress. In 1822, when the British Navigation Act<sup>23</sup> was under consideration, there were secret doubts among

<sup>15</sup> See Berdahl, *loc. cit.*, pp. 530-4. In March, 1818, however, the House rejected a motion to provide a salary for a Minister to Rio de la Plata, in fear that recognition might be implied (Moore, *Digest*, vol. I, p. 82).

<sup>16</sup> See joint resolution introduced on January 31, 1822 (Berdahl, *loc. cit.*, p. 530); report of Clay, Chairman of the Sen. Com'ee on For. Rel., June 18, 1836 (*ibid.*, p. 532); resolution of the Senate, July 1, 1836 (*ibid.*), and resolution of the House, July 4, 1836 (Moore, *Digest*, vol. I, p. 116). [In December, 1949, Secretary Acheson made it clear that there would be no recognition of the Chinese communist Government without full congressional consultation (*The Times*, December 8, 1949).]

<sup>17</sup> Senate Doc. 56, p. 32; Wright, *op. cit.*, p. 271; Berdahl, *loc. cit.*, p. 528. The same idea was expressed in his report of the Sen. Com'ee on For. Rel., June 18, 1836 (Moore, *Digest*, vol. I, p. 97).

<sup>18</sup> For a narration of his efforts, see Berdahl, *loc. cit.*, pp. 527-32.

<sup>19</sup> *Ibid.*, p. 537.

<sup>20</sup> Hackworth, vol. I, p. 162.

<sup>21</sup> *Ibid.*

<sup>22</sup> Berdahl, *loc. cit.*, p. 535. The resolution was lost in the Senate. For the Claim of Congress to the power of recognition, see also Goebel, *op. cit.*, n. 21, p. 15 above, pp. 195-7; MacCorkle, *op. cit.*, n. 12, p. 107 above, pp. 13-7.

<sup>23</sup> 3 Geo. 4, c. 43.

British officials whether it might not constitute recognition.<sup>24</sup> As was expected, the Spanish Government was not slow in lodging a protest against this legislative action.<sup>25</sup> Spain also protested against a proposed recognition which was intimated by the United States President in his message to Congress in March, 1822, in response to which Congress passed an appropriation bill.

The clamour for Congressional power of recognition was due to no small extent to the hesitancy on the part of the Executive to assert leadership in the matter. President Monroe's attitude towards the Latin American republics betrayed doubts as to his own power to grant recognition without the manifest support of Congress.<sup>26</sup> In July, 1836, resolutions were passed by both Houses of Congress declaring that 'the independence of Texas ought to be acknowledged'. President Jackson, however, refused to press the question of jurisdiction. Although he intimated that the power of recognition is only implied in the power to make treaties and to send and receive public ministers, he was willing to let Congress into some share of responsibility in deciding upon recognition, as recognition might lead to war and Congress was the body by whom alone war could be declared.<sup>27</sup> In the recognition of Haiti and Liberia in 1861-1862,<sup>28</sup> and of the Congo Free State in 1884,<sup>29</sup> the Executive department was careful to obtain prior legislative approval. In some instances, the Executive department even impliedly conceded the right of the legislature to effect recognition internationally.<sup>30</sup>

The majority of American statesmen and writers have always been inclined to the view that the Executive ought to be the proper organ for recognition. In a cabinet discussion in January, 1819, John Quincy Adams strongly urged that the constitutional power of recognition should be asserted by the Executive.<sup>31</sup> In reply to a query by the French Minister regarding a resolution in

<sup>24</sup> Planta, Under-Secretary, to Stratford Canning, May 11, 1822 (Smith, vol. I, p. 122).

<sup>25</sup> *Ibid.*

<sup>26</sup> Berdahl, *loc. cit.*, p. 526.

<sup>27</sup> *Ibid.*, pp. 532-3; Moore, *Digest*, vol. I, p. 99.

<sup>28</sup> Moore, *Digest*, vol. I, p. 116.

<sup>29</sup> *Ibid.*, p. 117.

<sup>30</sup> Thus, in an instruction to Marston, United States consul at Palermo, October 31, 1848, Sec. Buchanan said that recognition may be effected 'by an Act of Congress' (*ibid.*, pp. 245-6). In an instruction to Mann, June 18, 1849, Sec. Clayton wrote that, if conditions proved satisfactory, the President will 'recommend to Congress' the recognition of Hungary (*ibid.*, p. 246).

<sup>31</sup> *Ibid.*, pp. 244-5.

the House of Representatives relating to the recognition of monarchical government in Mexico, Secretary Seward said: 'This (*i.e.*, recognition) is a practical and purely Executive question, and a decision of it constitutionally belongs, not to the House of Representatives, nor even Congress, but to the President of the United States.'<sup>32</sup> In transmitting the resolution of sympathy of the House of Representatives of February 29, 1912, the legation at Peking was instructed to indicate to the Chinese leaders that the action did not amount to a recognition, which was a 'prerogative of the Executive'.<sup>33</sup> In December, 1919, a resolution was introduced in the Senate requesting the President to withdraw recognition of Carranza in Mexico. President Wilson protested that the proposed action of the Congress constituted an encroachment upon the Executive function.<sup>34</sup>

Any confusion or doubts as to the constitutional competence of the Executive in matters of recognition should have been removed by a report of the Senate Foreign Relations Committee presented by Mr. Hale to the Senate in January, 1897. Executive leadership in recognition was upheld as a uniform constitutional practice. It was conclusively declared:

'The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties. . . . Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, Congressional recognition of belligerency or independence would be a nullity.'<sup>35</sup>

When we say that recognition is effected by the act of the Executive, we mean the act of the Chief Executive and his representatives.<sup>36</sup> Acts of subordinates of the Chief Executive presumably under his instructions may also be considered authoritative.<sup>37</sup> The power of recognition may be delegated by the Chief Executive to his foreign minister and diplomatic representatives, and occasionally to consuls and military or naval

<sup>32</sup> Moore, *Digest*, vol. I, p. 246.

<sup>33</sup> Hackworth, vol. I, p. 164.

<sup>34</sup> *Ibid.* For similar views of Secretaries Hughes and Kellogg, see *ibid.*, pp. 161-2.

<sup>35</sup> Sen. Doc. 56, 54 Cong. 2 sess.; Berdahl, *loc. cit.*, p. 536. For further authorities in support of this view, see Hackworth, vol. I, pp. 162-4, vol. 4, s. 421.

<sup>36</sup> Wright, *op. cit.*, p. 28.

<sup>37</sup> *Ibid.*, p. 40.



commanders,<sup>38</sup> subject to repudiation.<sup>39</sup> Where discretionary authority is given in advance, the delegation must be considered absolute.<sup>40</sup>

The attitude of Anglo-American courts with regard to the allocation of the power of recognition may be characterised as one of self-denial. They disclaim any share in the power for themselves, regarding recognition as a political, rather than a legal question to be decided by the political departments of the government.<sup>41</sup> As to the competing claims of the legislative and

<sup>38</sup> This last-mentioned situation occurs more often in the recognition of belligerency. See, for instance, Moore, *Digest*, vol. I, pp. 88, 89, where the dealings of Spanish officials with insurgents were regarded as acts of recognition. As regards delegation to diplomatic representatives, see above, p. 121.

<sup>39</sup> E.g., the recognition by the United States consul of the Government of Sicily, 1837 (Moore, *Digest*, vol. I, pp. 112-3), the recognition by the United States minister of the Paez Government in Venezuela, 1862 (*ibid.*, p. 149), and the salute by Commodore Stanton to the Brazilian insurgent navy, 1893 (*ibid.*, p. 241), were subsequently repudiated. In two other cases—the recognition of the Rivas-Walker Government in Nicaragua, 1855 (*ibid.*, p. 141), and the recognition of the Zuloaga Government in Mexico, 1858 (*ibid.*, p. 147; McKenny case, Moore, *International Arbitrations*, vol. 3, p. 2882)—although the recognitions were not disavowed, breach of diplomatic relations soon followed.

<sup>40</sup> Thus, the recognition by diplomatic representatives who use blank credentials issued to them by the government would not be repudiable. See for cases of issuance of such credentials, Moore, *Digest*, vol. I, pp. 147-9. See also the case of Dudley Mann (*ibid.*, pp. 218 ff., 246).

<sup>41</sup> *City of Berne v. Bank of England* (1804), 9 Ves. Jun. 347; *Dolder v. Bank of England* (1805), 10 Ves. Jun. 352; *Same v. Lord Huntingfield* (1805), 11 Ves. Jun. 283; *The Dart and the Happy Couple* (1805), Stewarts Vice-Adm. Cas., Nova Scotia, 65; *The Manilla* (1808), Edw. 1; *Rose v. Himely* (1808), 4 Cranch 240; *The Pelican* (1809), Edw. Appx. D.; *Clark v. U.S.* (1811), 3 Wash. C.C. 101; *Gelston v. Hoyt* (1818), 3 Wheat. 246; *U.S. v. Palmer* (1818), 3 Wheat. 610; *The Divina Pastora* (1819), 4 Wheat. 52; *The Josepha Segunda* (1820), 5 Wheat. 338; *Thompson v. Powles* (1828), 2 Sim. 194; *Taylor v. Barclay* (1828), 2 Sim. 213; *Williams v. Suffolk Ins. Co.* (1839), 13 Pet. 415; *Prize Cases* (1862), 2 Black 635; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Same v. Dreyfus Bros. & Co.* (1888), 38 Ch. D. 348; *Jones v. U.S.* (1890), 137 U.S. 202; *U.S. v. Trumbull* (1891), 48 F. 94; *The Three Friends* (1897), 166 U.S. 1; *Mighell v. Sultan of Johore* [1894], 1 Q.B. 149; *Underhill v. Hernandez* (1897), 168 U.S. 250; *Ricaud v. American Metal Co.* (1918), 246 U.S. 304; *Oetjen v. Central Leather Co.* (1918), 246 U.S. 297; *Agency of Canadian Car & Foundry Co., Ltd. v. American Can Co.* (1918), 253 Fed. 152, (1919) 258 Fed. 363; *The Gagara* [1919], P. 95; *The Annette, The Dora* [1919], P. 105; *Russian Govt. v. Lehigh Valley R.R.* (1919), 293 Fed. 133, (1923) 293 Fed. 135; *The Rogdai* (1920), 278 F. 294; *Luther v. Sagor* [1921], 1 K.B. 456, 3 K.B. 532; *The Penza and the Tobolsk* (1921), 277 Fed. 91; *White, Child & Beney Ltd. v. Simmons, same v. Eagle Star & British Dominions Ins. Co.* (1922), 38 T.L.R. 367; *R.S.F.S.R. v. Cibrario* (1923), 235 N.Y. 255; *Duff Development Co. v. Government of Kelantan* [1924], A.C. 799; *Sokoloff v. Nat. Bank of N.Y.* (1924) 239 N.Y. 158; *Russian Re-Insurance Co. v. Stoddard* (1925) 240 N.Y. 149; *Lehigh Valley R.R. Co. v. State of Russia* (1927), 21 F. (2d) 396; *U.S. v. Curtiss-Wright Export Corp.* (1936), 299 U.S. 304; *U.S. v. Belmont* (1937), 301 U.S. 324; *Bank of Ethiopia v. Nat. Bank of Egypt & Ligouri* [1937], Ch. 513; *Banco de Bilbao v. Sancha & Rey* [1938], 2 K.B. 176;

the executive departments to the power of recognition, the English constitutional principle of executive leadership is well established. The American courts generally refer to the department competent to grant recognition as the 'political department' or simply 'the government'. In some judgments, reference is only made to the executive department; and where the reference is not clear, the tone of the decisions generally indicates that the executive department is meant. But distinctive pronouncements by the judiciary have been rare. In the *Prize Cases* (1862),<sup>42</sup> the court vindicated the right of the President to recognise a state of civil war, without, however, excluding the power of the Congress. In *United States v. Curtiss-Wright Export Corp. et al.* (1936), the court expressly endorsed Marshall's statement of March 7, 1800, in the House of Representatives, that: 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'<sup>43</sup> This conclusion has the support of numerous writers.<sup>44</sup>

This conclusion also holds in Continental courts.<sup>45</sup> But there are instances in which the rule was not observed by German and Italian courts.<sup>46</sup> In one instance, the French Advocate-General claimed the right of the court to decide upon the

*Tatem v. Gamboa* [1938], 3 All E.R. 135; *Haile Selassie v. Cable & Wireless Ltd.* (No. 2) [1939], Ch. 182, *The Arantzazu Mendi* [1939], A.C. 256; *Johnson v. Briggs Inc.* (1939) 12 N.Y. Supp. (2d) 60; *Azazi Kebede Tesema et al. v. Italian Government* (1940), 7 Palestine L. Rep. 597, *Annual Digest*, 1938-1940, Case No. 36; *Land Oberoesterreich v. Gude* (1940), 109 F. (2d) 635; *U.S. v. Pink* (1941), 315 U.S. 203; *The Maret* (1946), 145 F. (2d) 431; *Latvian State Cargo & Passenger S.S. Line v. Clark* (1948), 80 F. Supp. 683.

<sup>42</sup> (1862) 2 Black 635. See below, p. 394.

<sup>43</sup> (1936) 299 U.S. 304, 319.

<sup>44</sup> Phillimore, *op. cit.*, n. 21, p. 15 above, p. 37; Bluntschli, *op. cit.*, s. 122; Dickinson, *loc. cit.*, n. 20, p. 138 above, p. 118; Fraenkel, *loc. cit.*, n. 1, p. 135 above, p. 547; Willoughby, *op. cit.*, vol. I, p. 536.

<sup>45</sup> Noël-Henry, *op. cit.*, ss. 93-5; *Spanish Government v. Campuzano*, Sup. Ct. of Norway (1938), 33 A.J.I.L., 1939, p. 609, *Annual Digest*, 1938-1940, Case No. 27; *Spanish Republican Government (Security for Costs) Case*, Germany, Ct. App. of Frankfurt-on-the-Main (1938), *ibid.*, 1938-1940, Case No. 28; *Despa et fils v. U.R.S.S.*, Ct. App. of Liège (1931), *ibid.*, 1931-1932, Case No. 28; Harvard Research, *Competence of Courts*, 26 A.J.I.L., 1932, Special Supplement, p. 505.

<sup>46</sup> Lauterpacht, *The Function of Law in the International Community*, 1933, p. 389. It may be remarked that in *Diplomatic Immunities (German Foreign Office) case* (1926), decided by a German Court, the doctrine of the Court that the opinions of the government need not be followed except in special cases was *obiter dictum*, because the Foreign Office had itself refused to recognise the diplomatic status of the defendant and had also expressly declared that its statement need not be binding upon the court (*Annual Digest*, 1925-1926, Case No. 244).

question of the sovereignty of Chile, independently of the Executive.<sup>47</sup>

## § 2. ORGAN FOR INTERPRETATION

Although it is beyond the function of the court to determine in what relation the State *should* stand towards a foreign power, it certainly falls to the court to find out how it *does* stand toward that power, to inquire what has actually been accomplished by the political department and to decide what legal consequences should be attributed to that which has been accomplished. Although the acts of the political department are not open to question, they are nevertheless open to interpretation. As there may be various modes of recognition, and acts short of recognition, it would be necessary first for the court to inquire and decide whether in a given case recognition had actually been accorded. Thus, in *Underhill v. Hernandez* (1897),<sup>48</sup> recognition of the Venezuelan Government by the United States was proved by an examination of the archives of the State Department. Likewise, in *The Manilla* (1808),<sup>49</sup> and *The Pelican* (1809),<sup>50</sup> the English court interpreted certain Orders-in-Council in order to except certain parts of St. Domingo not 'under the dominion or in the actual possession' of France from enemy character, and refused to follow the decision of *The Dart and The Happy Couple* (1805),<sup>51</sup> in condemning ships trading with these areas. Earlier, in *The Helena* (1801),<sup>52</sup> Sir William Scott (later Lord Stowell), having satisfied himself that treaties had been entered into between Great Britain and the Dey of Algiers, held that a ship confiscated and sold by the latter conferred good title. In *The Ambrose Light* (1885), an American court, despite a statement from the State Department declaring that no state of war was 'in a formal sense' being recognised, held that recognition had in fact been effected

<sup>47</sup> *Matte et Ross v. La Société des Forges et Chantiers de la Méditerranée* (1891), 18 J.D.I., 1891, p. 868, at pp. 879-80. For the attitude of continental and Latin-American courts generally see Lyons, *loc. cit.*, n. 7 above.

<sup>48</sup> (1897) 168 U.S. 250. See dictum of Fuller C.J., below, p. 393.

<sup>49</sup> (1808) Edw. I.

<sup>50</sup> (1809) Edw. Appx. D.

<sup>51</sup> (1805) *Stewarts Vice-Adm. Cases*, Nova Scotia, 65. See discussions in Bushe-Fox, *Unrecognised States: Cases in the Admiralty and Common Law Courts, 1805-1826*, 13 B.Y.I.L., 1932, p. 39, at pp. 39-40.

<sup>52</sup> (1801) 4 C. Rob. 3.

by means of diplomatic notes from the Secretary of State to the Colombian Minister.<sup>53</sup> In *The Conserva* (1889),<sup>54</sup> Benedict J., in refusing to deduce 'uncertain implications' contained in the documents issued from the State Department which was put in evidence, stated that only a public proclamation or 'some public act by necessary implication equivalent to such a proclamation' may be accepted as proof of recognition. But it is precisely the function of the court to determine whether a particular act is or is not of such a character. That this determination is by no means easy may be shown by the case of *The Cherokee Nation v. The State of Georgia* (1831).<sup>55</sup> Here, the court had to decide whether the acts of the executive amounted to recognition of the Indian nation as a State. The findings of the majority and the minority of the judges of the United States Supreme Court were completely at odds with one another. In *Murray v. Parkes* (1942)<sup>56</sup> an English court took great pains to show that the Eire (Confirmation of Agreements) Act of 1938 did not constitute a recognition of the secession of Ireland from the British Commonwealth of Nations.<sup>57</sup>

Whether a foreign sovereign is recognised is a matter of which the courts should take cognizance. It is 'a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany'.<sup>58</sup> The court may, of course, be presumed to know treaties or government proclamations which are of public notoriety. Less obvious acts of recognition may be ascertained,

<sup>53</sup> (1885) 25 F. 408; Hudson, p. 187. The diplomatic notes in question are the note of April 9, 1885, refusing to recognise the Colombian decree to treat the insurgents as pirates (Wharton, *Digest*, vol. 3, p. 467), and the note of April 24 agreeing to respect the Colombian blockade (Moore, *Digest*, vol. 7, p. 812).

<sup>54</sup> (1889) 38 Fed. Rep. 431, 437; Moore, *Digest*, vol. I, p. 201.

<sup>55</sup> (1831) 5 Pet. 1.

<sup>56</sup> (1942) 58 T.L.R. 231; [1942] 2 K.B. 123.

<sup>57</sup> See also the confusion of evidence in *U.S., ex rel. d'Esquivia v. Uhl* (1943), below, p. 238.

<sup>58</sup> Kay L.J. in *Mighell v. Sultan of Johore* [1894], 1 Q.B. 149, 161; also *Duff Development Co. v. Kelantan Government* [1924], A.C. 797, 824.

by an examination of public documents and archives.<sup>59</sup> More doubtful cases may require a clear statement from the executive.<sup>60</sup>

The earliest instance in which information was required and supplied in the last-mentioned manner is the case of *Taylor v. Barclay* decided by the Court of Chancery in 1828.<sup>61</sup> The issue turned upon whether the Government of Guatemala was recognised by Britain. The plaintiff contended that the appointment of consuls by Britain and the participation of British officers at the Congress of Panama along with Guatemalan officers constituted recognition. Upon communication with the Foreign Office, however, the court was informed that recognition had not been accorded.<sup>62</sup>

Certificates issued by the executive department, like its other acts, are subject to judicial interpretation. In many cases, owing to the obscurity of the language and the complexity of the facts, interpretation is not only indispensable, but also has a decisive bearing upon the outcome of the litigation.<sup>63</sup> Thus, in *The Gagara* (1919) the statement of the Attorney-General, which was based upon a letter of the British Foreign Office, was to the effect that the British Government had 'for the time being provisionally, and with all necessary reservations as to the future, recognised the Estonian National Council as a *de facto* independent body, and accordingly has received a certain gentleman as the informal diplomatic representative of that

<sup>59</sup> See the American cases, *Williams v. Suffolk Ins. Co.* (1839), 13 Pet. 415; *Kennett v. Chambers* (1852), 14 How. 38; *Jones v. U.S.* (1890), 137 U.S. 202; *U.S. v. Trumbull* (1891), 48 F. 94, Hudson, p. 822. In the last-mentioned case, a consular exequatur was accepted as evidence of a person's status.

<sup>60</sup> For various ways by which a statement from the Executive may be obtained, see Hervey, *op. cit.*, n. 1, p. 135 above, p. 47; McNair, *loc. cit.*, n. 7 above, p. 65, n. 1; Lyons, *loc. cit.*

<sup>61</sup> 2 Sim. 213.

<sup>62</sup> See examples of similar inquiries: *Mighell v. Sultan of Johore* [1894], 1 Q.B. 149; *Duff Development Co. v. Government of Kelantan* [1924], A.C. 797; *Luther v. Sagor* [1921], 1 K.B. 456, 3 K.B. 532; *Abubakar v. Sultan of Johore* (1949), 15 *Malayan Law Journal*, 1949, p. 187, 16 *ibid.*, 1950, p. 3 (communication from Colonial Office); *Government of Russia v. Lehigh Valley R.R. Co.* (1919), 293 F. 133, Hudson, p. 89; *Salimoff v. Standard Oil Co. of N.Y.* (1933), 262 N.Y. 220, Hudson, p. 135.

<sup>63</sup> On this subject, see Oppenheim, vol. I, s. 357a; Lauterpacht, pp. 365-8; Lyons, *loc. cit.*, n. 7 above. Lord Sumner observed in *Duff Development Co. v. Kelantan* ([1924] A.C. 797, 824-5) that the statement from the Crown may often be 'temporary if not temporising.' 'In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing.'

Provisional Government'.<sup>64</sup> As, in the words of counsel for the appellant, the statement was 'deliberately ambiguous', it fell to the court to decide, on the basis of international law, the nature and status of 'a *de facto* body', and whether recognition could be provisional. The court gave the answer that the sovereignty of the Estonian National Council was, according to its interpretation of the government statement, recognised to the full, and, accordingly, its ship was immune from jurisdiction. The circumstances were similar in *The Annette* (1919).<sup>65</sup> The Foreign Office stated that the British Government was for the moment cooperating with the Provisional Government of Northern Russia and there was an exchange of representatives, but that Government 'has not been formally recognised' by the British Government. The court thereupon held that the Provisional Government was not recognised. It refused to infer from the letter that the government had been 'informally recognised'.<sup>66</sup> The Foreign Office letter in *Luther v. Sagor* (1921),<sup>67</sup> after stating the relations between Great Britain and Russia, suggested that the court should place its own construction upon the facts communicated to it.

In the more recent litigations arising out of the Italo-Abyssinian dispute and the Spanish Civil War 1936-39, the procedure of certification has been frequently resorted to.<sup>68</sup> In most cases, the war was still in progress and the Foreign Office certificates indicated the recognition by the British Government of *de facto* powers over limited territories, while at the same time continuing to recognise the *de jure* government. The language used in those certificates was intentionally evasive. The interpretative responsibility of the court, and its discretionary power in determining the legal consequences of the executive action were

<sup>64</sup> [1919] P. 95, 104.

<sup>65</sup> [1919] P. 105.

<sup>66</sup> For a comment on the freedom of the court in interpreting Foreign Office certificates in these two cases, see Lyons, *loc. cit.*, p. 266.

<sup>67</sup> [1921] 1 K.B. 456, 477; see below, pp. 248-9.

<sup>68</sup> *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. 513; *Banco de Bilbao v. Sancha and Rey* [1938] 2 K.B. 176; *Haile Selassie v. Cable and Wireless, Ltd.* (No. 1), [1938] Ch. 545, [1938] Ch. 839; (No. 2), [1939] Ch. 182; *The Arantzazu Mendi*, [1938] P. 233, [1939] P. 37, [1939] A.C. 256; *Compania Naviera Sota Y Azner v. Ramon de la Sota* (1938), unreported (see Lauterpacht, p. 365). [See also *Tallina Laevauhisus et al. v. Estonian State S.S. Line et al.* (1946), 80 Lloyd's List L.R. 99, in which the Court received a certificate concerning the status of the Republic of Estonia after its incorporation into the Soviet Union; and *Civil Air Transport Inc. v. Chennault* (1950), n. 13b, p. 120 above, for a similar statement regarding communist China.]

consequently very great. As we have seen in the Soviet cases discussed above, the courts seem to have held steadfastly to the words 'recognised' or 'not recognised' which may have appeared in the Foreign Office certificates, while giving little or no weight to other circumstances related therein, such as the exchange of representatives, cooperation in war, exemption of the agents of the governments in question from process of law, and the like. In the cases concerning the Abyssinian dispute and the Spanish Civil War, however, the emphasis was shifted. In *The Arantzazu Mendi* (1939) the Foreign Office letter, dated May 28, 1938, stated, among other things, that His Majesty's Government continued to recognise the Republican Government as the *de jure* Government of Spain, that His Majesty's Government recognised the Nationalist Government as a government which at the time exercised '*de facto* administrative control over the larger portion of Spain', and was not subordinate to any other government in Spain, and that His Majesty's Government 'have not accorded any other recognition to the Nationalist Government'.<sup>69</sup> Apparently the judges in all three courts—the Probate Division, the Court of Appeal and the House of Lords—were far more struck by the second point than by the first and third. They invariably held that, since the Nationalist Government was recognised as a *de facto* government, it was entitled to sovereign immunity. This, despite the continued recognition *de jure* of the Republican Government and despite the announcement of the Prime Minister in the House of Commons, ten days before the judgment by the House of Lords (on February 23, 1939), that the Government had made 'no decision as yet on the matter' of 'recognising the Spanish insurgent authorities as the *de facto* or *de jure* Government of Spain'.<sup>70</sup>

The responsibility of interpretation is even greater in cases where the Executive department refuses to give straight answers to questions put to it, for example, whether a certain state of international affairs has been recognised by it.<sup>71</sup>

<sup>69</sup> [1939] A.C. 258.

<sup>70</sup> Parl. Deb., H.C., 5th Ser., vol. 343, col. 1340-1. Professor Lauterpacht thinks that the judgment went far beyond the declared intentions of the British Government (Lauterpacht, p. 281).

<sup>71</sup> E.g., *White, Child and Beney, Ltd. v. Eagle Star and British Dominions Ins. Co.*, *Same v. Simmons* (1922), 38 T.L.R. 367, 373; *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co.* [1938], 3 All E.R. 80, [1939] 2 K.B. 544, 546.

A similar procedure of certification has been followed in American courts.<sup>72</sup> The statements embodied in those documents have been marked by equal confusion necessitating judicial interpretation. Thus, in *Russian Government v. Lehigh Valley R.R. Co.* (1923), the State Department certified to the court its continued recognition of Bakhmeteff as Ambassador of Russia and Serge Ughet as Chargé d'Affaires. But in a letter to the counsel for Lehigh, the Secretary of State admitted that 'the United States has not recognised any other government in Russia *since the fall of the provisional government*'.<sup>73</sup> It was contended for the company that, as there was no recognised government in Russia since the fall of the Provisional Government, it was clear that Bakhmeteff was not representative of any existing government. This argument, apparently unanswerable, was rejected by the court.<sup>74</sup>

The State Department certificate in *Salimoff v. Standard Oil Co. of N.Y.* (1933) was a virtual invitation to the court to make its own decision. It stated, firstly, that the United States Government accorded recognition to the Provisional Government of Russia, and had not recognised any government in Russia since the overthrow of that government; secondly, that the State Department was cognizant of the fact that the Soviet régime was exercising control and power in the territory of the former Russian Empire; thirdly, that the refusal of the United States to recognise the Soviet régime was not based on the ground that that régime did not exercise authority in that territory.<sup>75</sup> From this information, the court drew the conclusion that 'the United States Government recognises that the Soviet Government has functioned as a *de facto* or quasi government since 1917, ruling within its borders'.<sup>76</sup> To this *de facto* government the court attributed the power to confer title to property within its borders.

<sup>72</sup> *Ex parte Hitz* (1883), 111 U.S. 766; *In re Baiz* (1890), 135 U.S. 403; *The Rogdai* (1920), 278 F. 294, Hudson, p. 91; *Russian Government v. Lehigh Valley R.R. Co.* (1919) 293 F. 133, Hudson, p. 89; (1923) 293 F. 135, 1923-1924, Case No. 20; *Lehigh Valley R.R. Co. v. State of Russia* (1927), 21 F. (2d) 396, Hudson, Cases, 118; *Salimoff v. Standard Oil Co. of N.Y.* (1933), 262 N.Y. 220, Hudson, p. 135. For a list of certifications by the State Department regarding the status of Bakhmeteff, see *Guaranty Trust Co. of N.Y. v. U.S.* (1937), 304 U.S. 126, 138, n. 4. See also Lyons, *loc. cit.*, n. 7 above.

<sup>73</sup> Quoted in Jaffe, *op. cit.*, n. 21, p. 15 above, p. 216. Italics added.

<sup>74</sup> See criticism, *ibid.*, pp. 213-20.

<sup>75</sup> 262 N.Y. 220, 224; Hudson, pp. 135-6.

<sup>76</sup> Hudson, p. 137.



In *U.S., ex rel. d'Esquiva v. Uhl* (1943),<sup>77</sup> the State Department communicated to the district court copies of documents exchanged between it and the German Government, which led the court to conclude that the United States had recognised the *Anschluss* between Germany and Austria.<sup>78</sup> But in a Press release, July 27, 1942, the Secretary of State declared that 'This Government has never taken the position that Austria was legally absorbed into the German Reich'. The Circuit Court of Appeals found the evidence so conflicting, that it remanded the case for further inquiry.

From the above discussion, it appears that, although it belongs to the province of the political department to decide in what relation the State is to stand towards other States, such decisions remain abstract and uncertain, so far as individual litigants are concerned. It is only through the interpretation of the court that the nature and effect of the decisions of the political department can be ascertained. In doing so, the court, no less than the government, exercises great authority in determining the point of law.<sup>79</sup>

### § 3. THE *De Facto* SITUATION AND THE COURTS

✓ (To say that the courts should take no part in deciding upon the political relations of the State with foreign powers (such as granting them recognition) does not mean that they should also take no notice of the fact of the existence of a certain state of facts which may be relevant to the case in issue.<sup>80</sup> It is on account of this that the doctrine of judicial self-limitation is open to criticism. Recognition by the political department only determines the question of relations; it does not determine the question of existence.<sup>81</sup>) The

<sup>77</sup> (1943) 137 F. (2d) 903, Langer, *op. cit.*, n. 28, p. 60 above, p. 171, n. 46.

<sup>78</sup> The same conclusion was reached in previous cases: *Land Oberoesterreich v. Gude* (1940), 109 F. (2d) 635; *U.S., ex rel. Zdunic v. Uhl* (1941), 46 F. Supp. 688.

<sup>79</sup> See Lyons, *loc. cit.*, n. 7 above.

<sup>80</sup> See Note, *loc. cit.*, n. 69, p. 185 above, p. 609.

<sup>81</sup> Pound C.J. said in *Salimoff v. Standard Oil Co. of N.Y.*: 'The Courts may not recognise the Soviet Government as the *de jure* government until the State Department gives the word. They may, however, say that it is a government maintaining internal peace and order, providing for national defence and the general welfare, carrying on relations with our own government and others' (Hudson, p. 137; quoted with approval in *Werfel v. Zionostenska Banka* (1940), 23 N.Y.S. (2d) 1001, *Annual Digest*, 1938-1940, Case No. 32). Also *Inland Steel Co. v. Jelenovic* (1926), 84 Ind. App. 373, 376, *Annual*

political department is just as incompetent to determine the question of existence<sup>82</sup> as the courts are incompetent to determine the question of relations. The fields are well marked; the action of one in the sphere of the other need not be binding on the latter.<sup>83</sup> [It is not necessary that the mere fact that the government did not recognise a foreign power should imply that the courts should take no notice of its existence.<sup>84</sup> Nor is it necessary that the relations with a foreign power unrecognised by the government should be altered because the courts had taken cognizance of its existence.<sup>85</sup>] The objection raised by Noël-Henry<sup>86</sup> that, if the courts may determine the fact of existence, it would mean that all governments which exist have an international right to be recognised is probably based upon this misunderstanding. [Recognition, as here understood, is a matter of policy, not an obligation in international law. The action of the courts would, in any case, have no international standing. This follows inevitably from the premise that the judicial department is not the representative organ of the State in international relations.<sup>87</sup>]

When it is a question whether a government authority rules over a particular territory, or whether a state of civil war exists in a foreign country, the courts may regard it as a matter of fact, to be proved in accordance with the usual rules of evidence. Such

*Digest*, 1925-1926, Case No. 343; see Dickinson, *loc. cit.*, n. 27, p. 138 above, p. 217; *Werenjchik v. Ulen Contracting Corp.* (1930), 229 App. D. 36, 240, N.Y.S. 619, *Annual Digest*, 1929-1930. Case No. 19, Dickinson, *ibid.*, p. 234; *Wulfsohn v. R.S.F.S.R.* (1923), 234 N.Y. 372, Green, *op. cit.*, n. 7, p. 141 above, No. 35; *Russian Re-Insurance Co. v. Stoddard* (1925), 240 N.Y. 349, *Cases*, pp. 165-6; Baty, n. 21, p. 15 above, p. 226.

<sup>82</sup> Oddly enough, Marshall C.J. remarked in *U.S. v. Palmer* (1818), 3 Wheat. 610, 635, where civil war is recognized, 'such unacknowledged State . . . may be proved by such testimony as the nature of the case admits'.

<sup>83</sup> Le Normand (*op. cit.*, n. 1, p. 14 above, p. 279) says that the court cannot undo juridically what the government did politically, and *vice versa*.

<sup>84</sup> Such as in *City of Berne v. Bank of England* (1904), 9 Ves. Jun. 347.

<sup>85</sup> The Belgian Foreign Minister declared in the Belgian Senate, April 6, 1933: 'If the Belgian Courts, judging in the plenitude of their independence, decided that Russian legislations today can produce certain effects in Belgium, the government has not seen in that fact any opposition to the policy of non-recognition of the Government of the Soviet Union which it has followed' (Jessup, *Has the Supreme Court Abdicated One of its Functions?* 40 A.J.I.L., p. 168, at p. 171).

<sup>86</sup> Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 80.

<sup>87</sup> In *The Santissima Trinidad* (1822), 7 Wheat. 283, 299, it was, however, held: 'It is no answer to the reclamation of a foreign sovereign to say that he has been injured by the judiciary only. To him all the departments of the government make but one sovereignty.' [See Schwarzenberger, *op. cit.*, n. 57, p. 22 above, with regard to State responsibility for acts of judicial State organs, pp. 238-40.]

evidence may be procured from all available sources, of which the executive department is the most authentic and most authoritative, but not necessarily the exclusive one.<sup>88</sup> Borchard maintains that only in doubtful cases where there are more than one claimant need the executive department be resorted to.<sup>89</sup>

The view here set forth undoubtedly runs counter to the traditional doctrine of judicial self-limitation built up by Lord Eldon and Chief Justice Marshall in the Anglo-American decisions. But the first cases in which that doctrine was formulated do not seem to warrant the absolute character which was later attributed to it. In *City of Berne v. Bank of England* (1804), for instance, the question of the right to sue was regarded as one of comity, not of existence.<sup>90</sup> It would have been sufficient to say that, in the absence of authorisation from the government, the comity did not exist, without having to make the more sweeping statement that the court may not even 'take notice' of the unrecognised government.<sup>91</sup>

The American formulation of the doctrine is found in the oft quoted *dictum* of Marshall C.J. in *Rose v. Himely* (1808),<sup>92</sup> when he stated:

'It is for the governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.'

It is believed that the emphasis on this passage by later decisions

<sup>88</sup> See, however, below, p. 250, n. 50.

<sup>89</sup> Borchard, *loc. cit.*, n. 11, p. 99 above, p. 266.

<sup>90</sup> Above, pp. 135-8.

<sup>91</sup> (1804) 9 Ves. Jun. 347, 348. It has been pointed out that the fact that Lord Eldon was a member of the government, as well as a judge, explains the reason of this special caution (Lyons, *loc. cit.*, n. 7, p. 225 above, p. 245). Political considerations had prevented him from stating in consistent terms what the court can know and what it cannot judicially know without government authorisation. His statement in *Dolder v. Bank of England* (1805), 10 Ves. Jun. 352, quoted above, p. 135, is not merely contradictory to his statement in the *City of Berne* case, but also leaves unexplained why, while he could know of the existence of revolutions in Switzerland in absence of government certification, he could not of his own knowledge take notice of the new government (Lyons, *ibid.*, p. 246). However, as a matter of history, it was in *City of Berne v. Bank of England* that the practice of requiring Foreign Office certification for proof of the existence of foreign States, governments, and the like was first introduced (*ibid.*, p. 248).

<sup>92</sup> (1808) 4 Cranch 240, 272.

has been somewhat misplaced. The question of the *independence* of St. Domingo, even if material to the decision, was certainly not the main ground upon which the judgment was based. The case concerned the validity of the condemnation by a French court of an American vessel captured ten leagues from the coast of St. Domingo for violation of French laws forbidding trade with St. Domingo, which was then in revolt against the French authorities. The condemnation was effected while the ship was in a Spanish port. The main questions were, first, whether capture beyond territorial limits was lawful; secondly, whether the French court, in condemning a prize lying in a foreign port, was exercising jurisdiction recognisable in international law.

Regarding the first point,<sup>93</sup> the legality depended upon whether the capture was made in exercise of right of war or in exercise of the pacific right of sovereignty.<sup>94</sup> Since the French laws on which the sentence was based purported to be territorial, it was held that the capture was made in exercise of domestic sovereignty, and so invalid on the high seas.<sup>95</sup>

Curiously, Marshall C.J., while insisting that the question of independence should be decided by the government, did not hesitate to pronounce that 'A war *de facto* then unquestionably existed between France and St. Domingo'.<sup>96</sup> It is not shown that his acknowledgment of the existence of civil war was the result of the determination of the government. It seems that Marshall had considered the court competent to take notice of the existence of a civil war, despite the absence of action by the American Government. Even in the matter of independence, if 'France shall relinquish her claim', the court may give effect to the fact without awaiting action by its own government.<sup>97</sup> This is quite different from the strict doctrine of judicial self-limitation, of which it is supposed to be the origin. Having regard to the cir-

<sup>93</sup> The second point is irrelevant to the present discussion. It was held that the proceedings were *ex parte* and invalid (p. 279). But this ruling was overruled in *Hudson v. Guestier, La Font v. Bigelow* (1808), 4 Cranch 293, 295.

<sup>94</sup> (1808) 4 Cranch 240, 279.

<sup>95</sup> *Ibid.*, pp. 272-6. Johnson J., dissenting, argued that the capture was an exercise of belligerent right, and that the nature of the capture was not affected by the fact that France limited its exercise to two leagues from the coast (*ibid.*, p. 289).

<sup>96</sup> *Ibid.*, p. 271.

<sup>97</sup> See Jaffe, *op. cit.*, p. 131.

cumstances of these two earliest cases (*City of Berne v. Bank of England* (1804) and *Rose v. Himely* (1808)), it is doubtful whether they have said all that has been attributed to them, at least with all the rigidity and comprehensiveness with which the doctrine is characterised.

The *rationes* of the doctrine, though not deducible from these two cases, however, found expression in subsequent judgments and writings of international lawyers. Hervey<sup>98</sup> mentions four reasons behind the doctrine:

(a) That the function of recognition is vested by the Constitution in the political departments.<sup>99</sup> It was said in *The Rogdai* (1920) that, in extending recognition, 'the voice of the Chief Executive is the voice, not of a branch of government, but of the national sovereignty, equally binding all departments'.<sup>1</sup> Yet it is not necessary to conclude that this function of recognition includes the determination of international facts incidental to a strictly private litigation.

(b) That sound policy and reason require that the court should act in unison with the political department in matters involving foreign relations.<sup>2</sup> Why? Because, suggests Noël-Henry, it would strengthen the hands of the executive in its dealings with foreign States.<sup>3</sup> But, it may be doubted, is it the legitimate function of the court to make itself the instrument of foreign policy? Even if it were, it can achieve very little in the exercise of that function. As is well said by Dr. Mann:

'It is believed that where recognition is felt to be in fact redundant by the foreign power, the attitude of the British Judiciary will not make it necessary or desirable, and, conversely, that where a foreign non-recognised government feels recognition to be necessary or desirable, judicial recognition in England will not make its efforts redundant.'<sup>4</sup>

<sup>98</sup> *Op. cit.*, p. 52. His order is not here followed.

<sup>99</sup> *Foster v. Neilson* (1829), 2 Pet. 253, 307, 309; *Oetjen v. Central Leather Co.* (1917), 246 U.S. 297, 302.

<sup>1</sup> 278 F. 294, Hudson, p. 92. See also Weston, *Political Questions*, 38 H.L.R. 1924-1925, p. 296, at pp. 318-9.

<sup>2</sup> *Taylor v. Barclay* (1828) 2 Sim. 213, 221; *Foster v. Globe Venture Syndicate Ltd.* [1900], 1 Ch.D. 811, 814; *Oetjen v. Central Leather Co.* (1917), 246 U.S. 297, 304; *The Rogdai* (1920), 278 F. 294, Hudson, p. 92; *Ex parte Muir* (1921), 254 U.S. 522, 533. See also McNair, *loc. cit.*, n. 7, p. 225 above, p. 65; Weston, *loc. cit.*, p. 319.

<sup>3</sup> Noël-Henry, *op. cit.*, s. 85.

<sup>4</sup> Mann, *Judiciary and Executive in Foreign Relations*, 29 *Grotius Transactions*, 1944, p. 143, at pp. 157-8.

In the American cases regarding the Litvinov Assignment,<sup>5</sup> the United States Supreme Court has gone to great lengths in affirming the doctrine of judicial subordination to executive policy. It has virtually ousted a well-established principle of the unenforceability of foreign fiscal or penal laws,<sup>6</sup> for the purpose of implementing a policy of recognition.<sup>7</sup> In England, the courts refused to go that far. In a case concerning the existence of war between China and Japan, to the argument that the court ought to follow the decision of the Executive in order not to cause embarrassment, Sir Wilfrid Greene, M.R., replied: 'I do not myself find the fear of the embarrassment of the Executive a very attractive basis upon which to build a rule of English law.'<sup>8</sup> Some writers fear that the desire to avoid embarrassing the Executive by allowing it to say the last word on an international situation might misfire and result in real embarrassment in a situation in which the Executive would much rather remain silent.<sup>9</sup>

(c) That the court is unfit to determine a question of independence, because it is political in nature.<sup>10</sup> If by this is meant that the court has no means of deciding in what relation, in consequence of such independence, the State should stand towards the power in question, the argument can be readily admitted. But if it is meant that the court has no means of acquiring knowledge of the existence of a certain state of affairs in the world, it is denying the usefulness of the ordinary rules of evidence.

(d) That the court has no means of enforcing its decision in case of an adverse judgment. It is true that the court cannot send or receive diplomatic representatives or make treaties or perform

<sup>5</sup> *U.S. v. Belmont* (1936), 301 U.S. 324; *U.S. v. Pink* (1941), 315 U.S. 203. Cf. also *U.S. v. New York Trust Co.* (1946), 75 F. Supp. 583; *A/S Merilaid & Co. v. Chase Nat. Bank of N.Y.* (1947), 71 N.Y.S. (2d) 377.

<sup>6</sup> Habicht, *The Application of Soviet Laws and the Exception of Public Order*, 31 A.J.I.L., 1937, p. 245.

<sup>7</sup> In *U.S. v. Pink* it was said that the Assignment was 'part and parcel' of the policy of recognition and that it was within the power of the President to remove all obstacles to full recognition ((1941) 315 U.S. 203, 227, 229).

<sup>8</sup> *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co.* [1939], 2 K.B. 544, 552.

<sup>9</sup> Mann, *loc. cit.*, p. 163.

<sup>10</sup> *Kennett v. Chambers* (1852), 14 How. 38, Hudson, p. 138, at p. 141; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch.D. 489, 497.

any of the other actions which are the usual means of giving effect to a decision to recognise. But this is not what an adverse finding by the court would involve. The enforcement of its judgment would involve nothing more than the enforcement of any judgment in private litigation, namely, the enforcement upon persons and property within its jurisdiction. In this sense, it may sometimes happen that there is greater difficulty of enforcement by following the Executive lead than by giving an independent judgment.<sup>11</sup>

The dominating influence of the Eldon-Marshall tradition in Anglo-American courts has been greatly affected by several important departures. In *Consul of Spain v. La Conception* (1819),<sup>12</sup> Johnson J. held that, although the courts must consider a government recognised by their own government as independent, courts 'exercising jurisdiction of international law may often be called upon to deduce the fact of national independence from history, evidence or public notoriety where there has been no formal public recognition'.<sup>13</sup> In *Yrissari v. Clement* (1826),<sup>14</sup> Best C.J. maintained, likewise, that 'the existence of unacknowledged States must be proved by evidence'.<sup>15</sup> 'History, evidence and public notoriety', were admitted as evidence in *The Helena* (1801),<sup>16</sup> and *The Charkieh* (1873).<sup>17</sup> In the more recent litigations in the United States concerning the unrecognised Soviet Government, the American courts have placed themselves in an impossible position through the rigid application of the Eldon-Marshall doctrine, and the rediscovery of Johnson and Best no doubt gave them immense relief.<sup>18</sup>

Johnson J.'s opinion in *Consul of Spain v. La Conception* (1819) brings out two points of fundamental importance: What is the scope of judicial competence in the administration of inter-

<sup>11</sup> There is the possibility that such judgments would be liable to be invalidated in foreign States (Noël-Henry, *op. cit.*, s. 98).

<sup>12</sup> Fed. Cas. No. 3137, 2 Wheel. Cr. Case (1819), 597. See Jaffe, *op. cit.*, p. 133. The principle was approved by Story J. in the Sup. Ct. (1821) 6 Wheat. 235, though the decision was reversed on other grounds.

<sup>13</sup> See above, p. 89.

<sup>14</sup> (1826) 3 Bing. 432.

<sup>15</sup> *Ibid.*, p. 438. See also *Kinder v. Everett* (1823), *The Times*, December 22, 1823, and *Revenga v. Mackintosh* (1824), 2 B. & C. 693, below, p. 313.

<sup>16</sup> (1801) 4 C. Rob. 3, 5.

<sup>17</sup> (1873) L.R. 4 A. & E. 59.

<sup>18</sup> Above, p. 171.

national law, and to what extent are acts of the Executive concerning international relations conclusive upon the courts?

In England and in the United States, the law of nations is regarded by the courts as part of the law of the land.<sup>19</sup> But courts applying principles of international law, apply only those principles that are adopted by English and American law.<sup>20</sup>

The Constitution of the United States contains express authorisation for the application of conventional international law.<sup>21</sup> In Anglo-American jurisprudence international law is assumed to have been incorporated<sup>22</sup> unless it comes into direct conflict with positive rules of national law.<sup>23</sup>

A national court, being a creature of its national juridical system, cannot, naturally, go beyond the limits of competence prescribed by its creator. It is not entitled, therefore, to administer that part of international law which its juridical system reserves to be applied by other, that is political, organs of the State. By this we mean decisions on questions concerning relations between State and State. The court cannot, for instance, refuse to respect the status of a foreign diplomatic agent received by the political department<sup>24</sup>; nor can it accord him status where his reception has been refused.<sup>25</sup> It cannot declare invalid a treaty which is voidable in international law, until it has been

<sup>19</sup> Scott, *The Legal Nature of International Law*, 1 A.J.I.L., 1907, p. 831, esp. at p. 852 *et seq.*, and authorities therein cited; Picciotto, *The Relation of International Law to the Law of England and of the United States*, 1915.

<sup>20</sup> Willoughby, *The Legal Nature of International Law*, 2 A.J.I.L., 1908, p. 357. See on this subject, Moore, *The Relations of International Law to National Law in the American Republic*, 9 *Proceedings*, 1915, p. 11; Wilson, *The Relations of International Law to National Law in the American Republics*, *ibid.*, p. 23.

<sup>21</sup> Article VI (2) of U.S. Constitution. Similarly, the French Constitution of 1946, Articles 26, 28. The whole body of international law has been received into the following Constitutions: German Constitution of 1919, Article IV, 112 B.F.S.P., 1919, p. 1063; Austrian Constitution of 1920, Article IX, 113 *ibid.*, 1920, p. 884; Spanish Constitution of 1931, Article 1 (7), 134 *ibid.*, 1931, p. 1141; Basic Law for the Federal Republic of Germany, 1949, Article 25. See also Cavaré, *La Reconnaissance de l'Etat et la Mandchoukouo*, 42 R.G.D.I.P., 1935, p. 1, at p. 77.

<sup>22</sup> *West Rand Central Gold Mining Co. v. The King* [1905], 2 K.B. 391, 406-7; *Rose v. Himely* (1808), 4 Cranch 240, 276.

<sup>23</sup> *Chung Chi Cheung v. The King* [1939], A.C. 160, 168; *The Nereide* (1815), 9 Cranch 388, 422; *Hilton v. Guyot* (1894), 159 U.S. 113, 163; *Mortensen v. Peters*, 14 S.L.T.R. 227; (1906) 8 Fraser 93. See Holland, *Studies in International Law*, 1898, p. 199; Picciotto, *op. cit.*, pp. 125-6; Cobbett, vol. I, pp. 19-21.

<sup>24</sup> *Engelke v. Musmann* [1928], A.C. 433.

<sup>25</sup> *Ex parte Hitz* (1883), 111 U.S. 766; *In re Baiz* (1890), 135 U.S. 403; *Re Cloete*, *Ex parte Cloete* (1891), 65 L.T. 102.



denounced by the government.<sup>26</sup> Likewise, a court cannot deny the title over a territory which is claimed by the government.<sup>27</sup> Conversely, if a person is received as a foreign diplomatic agent, or a treaty is denounced by the Executive department, the court would be obliged to act in accordance with international law in conceding diplomatic immunities or denying rights under the treaty, as the case may be. A national court<sup>28</sup> does not possess the power to examine the *international* legality of the acts of the Executive department. It merely applies the principles of international law to a situation of fact, based upon the assumption of the validity of the act of the sovereign. It interprets the act of the Executive in terms of international law and attributes to it such consequences as according to international law must follow. Thus, it would give effect to the legal consequences of war declared by the government, even if that war is itself an aggressive and illegal war. It would give effect to the annulment of a treaty by the government, even if the annulment were internationally wrong.<sup>29</sup>

Thus, it may be seen that, while a national court does not act upon international law with a view to producing an international effect, it does, nevertheless, give effect to international law upon the basis of acts of the Executive department with respect to questions brought before it.<sup>30</sup> Within such limitations

<sup>26</sup> *Charlton v. Kelly* (1913), 229 U.S. 447, 476.

<sup>27</sup> *Jones v. U.S.* (1890), 137 U.S. 202.

<sup>28</sup> The English Prize Court under Lord Stowell and Dr. Lushington had claimed the right to review acts of the government according to the standards of international law. See, for instance, *The Juffrow Maria Schroeder* (1800), 3 C. Rob. 147, 155. This view is opposed by Holland (*op. cit.*, p. 199). Johnson J. suggests that the function of the Prize Court is not to revise the act of the sovereign himself, but only to revise that of his agents and to ensure that his authority is not being incorrectly employed (dissenting opinion in *Rose v. Himely* (1808), 4 Cranch 240, 282). In *The Zamora* [1916], 2 A.C. 77 it was held by the Judicial Committee of the Privy Council that a Prize Court, though a national court, is set up for the purpose of administering international law. It has the right to examine the international validity of the acts of the Executive, though subject to the enactments of the Legislature, in which case it would be administering municipal rather than international law.

<sup>29</sup> *Chae Chan Ping v. U.S.* (1888), 130 U.S. 581, 600. Likewise, in *Regnault v. Rousski-Renault Co.*, decided by the Ct. of App., Paris (1926), it was held that a notice of suspension of treaty by the government was binding upon the court, and no inquiry could be made as to its legality in international law (53 J.D.I., 1926, p. 671). French courts generally refuse to interpret treaties, but follow the interpretations of the government (Noël-Henry, *op. cit.*, s. 60).

<sup>30</sup> See Project VII, Article 6 of the American Institute of International Law (20 A.J.I.L., 1926, Special Supplement, p. 312).

the administration of international law by the national court is very real. This is precisely the position taken by those who seek to curtail the doctrine of judicial self-limitation.)

(It is not urged that the court should take upon itself the task of granting recognition; it is merely maintained that, without deciding upon questions concerning the relations of the State of the forum with foreign States, the court may not ignore certain facts before it (including the international acts of the Executive) incidental to private litigation, the significance of which are defined by international law. In cases where no question of international relations is involved, the court may proceed to make its own finding of fact, in spite of a divergence of view with the Executive.<sup>31</sup> Even Lord Sumner, who in *Duff Development Co. v. Government of Kelantan* (1924),<sup>32</sup> upheld the conclusiveness of the Executive certificate, conceded that a different principle should be adopted in cases where no direct act of the Crown is involved.) Commenting on *Foster v. Globe Venture Syndicate Ltd.* (1900),<sup>33</sup> his lordship thought that the question of boundaries should be treated differently from a question of independence. He criticised Farwell J. for having relied upon the dictum of Shadwell V.-C. in *Thompson* (*sic*; should read *Taylor*) *v. Barclay* (1828) that 'The Courts of the King should act in unison with the Government of the King'.<sup>34</sup> He considered this to be 'rather a maxim of policy than a rule of law'.<sup>35</sup> Continuing, he argued:

'The frontiers of foreign countries are matters of geography, not always involved with matters of State. . . . Hong Kong, for example, has been spoken of judicially as if it were a Chinese port: *Nobel's Explosives Co. v. Jenkins & Co.*'<sup>36</sup> It does not, however, follow that, on mere questions of this kind, resort ought to be had to the Foreign Office, or that its answer, if given, must necessarily be taken to be correct in fact. . . . I think such boun-

<sup>31</sup> Thus, in *Tartar Chemical Co. v. U.S.* (1902) (116 Fed. 726, cited in Jaffe, *op. cit.*, p. 231), the court refused to accept the interpretation by the Executive that the word 'France' in a treaty does not include Algeria.

<sup>32</sup> [1924] A.C. 797.

<sup>33</sup> [1900] 1 Ch. 811. The question was whether the Suss district was within the territory of Mexico.

<sup>34</sup> 2 Sim. 213, 221.

<sup>35</sup> [1924] A.C. 797, 826.

<sup>36</sup> (1896) 1 Com. Cas. 436, 439.

daries, where no acts of the Crown with regard to them have been involved, must depend on evidence given in the ordinary way.’<sup>37</sup>

In *The Jupiter* (No. 3) (1927), on the question whether a revolutionary government exercised authority in Odessa at a given date, the Court relied upon evidence, without consulting the Foreign Office.<sup>38</sup> In a case concerning the purchase of silver by the United States Treasury from the Republican Government of Spain, the American court held that the acts of the Secretary of the Treasury were not binding upon the court in a controversy as to the validity of a purchase of property which did not affect the international or diplomatic relations of the United States.<sup>39</sup>

✓ There is, therefore, evidently room for believing that in cases in which the relations of the State of the forum with other States are not directly affected, a question as to the existence of international facts may be treated as properly falling within the judicial, rather than the political, function. This view has been given much expression in American cases concerning the Soviet Government.<sup>40</sup>

✓ Although it is true that the question of the existence of a State or government or civil war may be judicially determined by the ordinary method of evidence, the best evidence would, no doubt, be a statement from the political department in charge of foreign relations.<sup>41</sup> Such information is authoritative to the point of being conclusive as to fact but may leave the court to draw its own conclusion as to law.<sup>42</sup> This is peculiarly an English doctrine, not shared by American courts. Thus in *Luther v. Sagor* (1921) the Foreign Office letter of November 27, 1920, after stating its assent to the immunity of M. Krassin and to the claim that the Soviet Government was a ‘State Government of Russia’, and that the British Government had ‘never officially recognised’ that

<sup>37</sup> [1924] A.C. 797, 826-7.

<sup>38</sup> [1927] P. 122, 146-51. See also *R. v. L. J. de Jager* (1901), 22 Natal L.R. 65; [1907] A.C. 326, as regards the extent of enemy penetration into Natal.

<sup>39</sup> *Banco de Espana v. Federal Reserve Bank of N.Y.*, *Same v. U.S. Lines Co.*, *Same v. Solomon* (1940), 114 F. (2d) 438, *Annual Digest*, 1938-1940, Case No. 6, p. 14.

<sup>40</sup> E.g., dictum of Lehman J., in *Russian Re-Insurance Co. v. Stoddard* (1925), 240 N.Y. 149, quoted in *Werenjchik v. Ulen Contracting Corporation* (1930), 229 App. Div. 36, 37, above, p. 152. See also above, Part 3, ch. 11.

<sup>41</sup> Lord Sumner in *Duff Development Co. v. Kelantan Government* [1924], A.C. 797, 824.

<sup>42</sup> Sir Arnold McNair, *Legal Effects of War*, 1948, p. 343.

Government, disclaimed any intention to decide the question of law.<sup>43</sup> The Court, thereupon, held that the Soviet Government could not be treated as sovereign.<sup>44</sup>

*White, Child and Beney Ltd. v. Eagle Star and British Dominions Ins. Co.* (1922) is remarkably illustrative of the principle here set forth: When asked the crucial date on which the Soviet Government ascended to power in Russia, the Foreign Office declined to express any opinion as to the actual date, observing that 'the question being also questions of fact for the Courts to determine on the evidence laid before them'.<sup>45</sup> So also in *The Arantzazu Mendi* (1939), the Foreign Office, after stating the relation in which the British Government stood towards the Nationalist Government in Spain, declined to decide whether that body was a sovereign government.<sup>46</sup> Similarly in *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co.* (1939),<sup>47</sup> the Foreign Office declined to state whether war existed between China and Japan in 1938, and suggested that the attitude of the government may not be conclusive on the interpretation of the word 'war' in the charter-party in question. It was pointed out by Sir Wilfrid Greene, M.R., that the question was different from one in which the relations of the State of the forum is in issue. Here the question was solely of the existence of a fact, of which the recognition by the government was unnecessary. He therefore held war to be in existence, despite the lack of recognition by the Foreign Office. In *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937)<sup>48</sup> Clauson J., after stating that the act of a recognised government cannot be impugned, observed in an *obiter dictum* that such treatment should also apply 'to any acts of that government done at any time at which, on the facts proved before me, they were in fact the government, though not yet

<sup>43</sup> [1921] 1 K.B. 477. It is thought by a recent writer, however, that the statement of the Foreign Office regarding M. Krassin as one who 'should be exempt from the process of the Courts' came very close to the American practice of 'suggestions' of the State Department (see Lyons, *loc. cit.*, n. 7, p. 225 above, p. 267). See also Lipstein, *loc. cit.*, n. 42, p. 159 above.

<sup>44</sup> At pp. 477-8. The Foreign Office letter in *The Annette* [1919] P. 105 was similar, but that in *The Gagara* [1919] P. 95 seemed to have overstepped these bounds in suggesting that the provisionally recognised Estonian National Council was entitled to set up a Prize Court.

<sup>45</sup> (1922) 38 T.L.R. 367, 371; above pp. 181-2.

<sup>46</sup> [1938] pp. 233, 242-3, [1939] A.C. 256, below, pp. 320-3.

<sup>47</sup> [1939] 2 K.B. 544, 553.

<sup>48</sup> [1937] Ch. 513, 519.

recognised as such by His Majesty' (italics added). In *Tallinna Laevauhisus Ltd. v. Estonia State Shipping Line* (1946) the Foreign Office stated that the extinction of the Republic of Estonia was recognised, but that 'the effect of such recognition and in particular the date to which it should be deemed to relate back appear to me to be questions for the Court to decide in the light of statements set out above and of the evidence before it'.<sup>49</sup>

The doctrine of judicial self-limitation means, then, in England that, while the statement of the political department as to what has transpired between it and foreign powers and to the state of international facts must be regarded as conclusive evidence,<sup>50</sup> the political department seldom claimed, nor did the courts concede, the right to decide the legal implications of such facts.<sup>51</sup>

If the certificate of the political department is evidence of fact, it would be conclusive as to what has taken place in matters peculiarly within its knowledge, but not as to the conclusion of

<sup>49</sup> (1946) 79 Lloyd's List L.R. 251.

<sup>50</sup> In *Duff Development Co. v. Kelantan Government* (1924) the Lords were not agreed on this point. Viscount Finlay said: 'Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance' ([1924] A.C. 797, 813). Lord Sumner, on the other hand, was of the view that, while the act of recognition is an act of sovereignty, and persons so recognized must be treated as sovereign in English courts, a statement regarding the recognition is merely the 'best evidence' of the fact of recognition, although, when such evidence is advanced, no other evidence would be admissible (at p. 824).

<sup>51</sup> In *Engelke v. Musmann* (1928) the Attorney-General stated: 'It is admitted, however, that such a statement (by the Foreign Secretary concerning diplomatic status) is conclusive upon the question of diplomatic status alone; and it is still for the court to determine as a matter of law whether the diplomatic status having been conclusively proved, immunity from process necessarily follows' ([1928] A.C. 433, 436). In the *Parlement Belge* ((1879) 4 P.D. 129; (1880) 5 P.D. 197) the Admiralty Advocate contended that the Crown's declaration that a ship was entitled to immunity was conclusive. The contention was tacitly rejected by the court, which went on to decide the question for itself. Brett L.J., even expressed doubt whether 'if her Majesty chose thus to recognise as ambassador a person who had not been sent by any foreign government he could claim the privileges of an ambassador' (5 P.D. 198). See, however, the contrary view of Viscount Finlay in *Duff Development Co. v. Kelantan Government*: 'There is no ground for saying that because the question involves considerations of law, these must be determined by the courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law' ([1924] A.C. 797, 815). This case was followed by the Court of Appeal in *R. v. Bottrill, ex parte Kuechenmeister* [1947] 1 K.B. 41, confirming Goddard L.C.J. [1946], 1 All E.R. 635, 636. For comments on the conclusiveness of the British Foreign Office certificate, see Feller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 A.J.I.L., 1931, p. 83, at pp. 84, 90; Lauterpacht, pp. 365-8, and *The Form of Foreign Office Certificates*, 20 B.Y.I.L., 1939, p. 125; Lyons, *loc. cit.*, p. 240.

the legal consequences implied therein. Often, however, there are cases in which the communication from the political department to the court contains partly facts, and partly its conclusions regarding these facts. English courts have nevertheless accepted these conclusions without inquiring whether, basing their decisions upon these facts, they would themselves arrive at these conclusions. Thus, in *The Annette* (1919) and *Luther v. Sagor* (1921) (in the court of first instance), while denying recognition, the Foreign Office stated that there had been co-operation and exchanges of representatives with the entities in question. In *Luther v. Sagor* it was further admitted that the Soviet representative was accorded exemption from legal process, and that the Soviet claim to be the State government of Russia was assented to.<sup>52</sup> The court refused to consider whether these facts, also authoritatively testified by the Foreign Office, might not be given the same weight as the Foreign Office statement of non-recognition. In *The Arantzazu Mendi* (1939) if the Foreign Office certificate really meant that the Nationalists had been 'recognised' as a State government, the Foreign Office had certainly contradicted itself by saying that it also recognised the Republican Government as the *de jure* Government of Spain.<sup>53</sup> But the court was content to accept the conclusion on the recognition of the Nationalists, without regard to other facts set forth in the certificate.

The danger of executive inroads into questions of law through the acceptance of its conclusions as to fact is clearly illustrated in *Duff Development Co. v. Kelantan Government* (1924)<sup>54</sup>. Here, the respondent, the Sultan of Kelantan, claimed sovereign immunity. A letter from the Colonial Office stated that the British Government did not exercise or claim any right of sovereignty or jurisdiction over Kelantan, and that the Sultan 'generally speaking exercises without question the usual attributes of sovereignty'.<sup>55</sup> Documents enclosed in the letter showed that Kelantan was formerly a dependency of Siam, who transferred all her rights over Kelantan to the British Government, and that by an agreement with Britain the Sultan surrendered his power of

<sup>52</sup> Above, p. 248.

<sup>53</sup> Above, p. 236.

<sup>54</sup> [1924] A.C. 797.

<sup>55</sup> *Ibid.*, pp. 806-7.

foreign relations and engaged himself to follow 'in all matters of administration' the advice of a British adviser.<sup>56</sup> Here, the agreement was an act of State in the international sphere. The letter from the Colonial Office was neither an act of recognition, nor even a statement that an act of recognition had taken place. It was pointed out by counsel for the appellant that such a statement could not be presumed to have the same authority as the agreement itself, and it was urged that the court should be fully competent to decide for itself what the legal implications of the agreement were, without having to follow the construction given to it by the Colonial Office.<sup>57</sup> It is indeed difficult to understand the purpose of appending the agreement if no other construction was allowed to be placed upon it than that given by the Colonial Office. If the court was denied the right to dispute the interpretation of the Colonial Office, it must be because the Colonial Office determined the question, not only of fact, but also of law.<sup>58</sup> In the recent case *R. v. Bottrill*, the Foreign Office interpreted the Berlin Declaration to mean that the State of Germany continued to exist. The applicant's argument that the Declaration, being an act of sovereignty, should have priority over the Foreign Office certificate was overruled.<sup>59</sup>

In arguing that a dependent people ought not to be regarded as sovereign under international law, it is not suggested that a State should under no circumstances waive its right of jurisdiction unless so required by international law. Every State is free to decide for itself what persons, apart from those designated by international law, are entitled to jurisdictional immunity. There

<sup>56</sup> [1924] A.C. 797, p. 807.

<sup>57</sup> *Ibid.*, pp. 800-1.

<sup>58</sup> See *dictum* of Viscount Finlay, *ibid.*, p. 815, quoted above, n. 51. In a closely similar case, *Mighell v. Sultan of Johore* [1894], 1 Q.B. 149, Willis J. examined both the Colonial Office certificate and the treaty with the Sultan, although this method was not adopted in the higher court (p. 153), [see also *Abubakar v. Sultan of Johore* (1949), p. 42 above, n. 52]. The artificiality of the executive decision was stretched to breaking point in *Statham v. Statham and Gaekwar of Baroda* [1912], P. 92. Here, the India Office admitted that the Gaekwar was 'not independent', and that the King of England exercised over him 'such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain' (p. 95. *Italics added*). In 1874, the then reigning Gaekwar was brought to trial and deposed by the British Government (p. 94). The court, nevertheless, held that the Gaekwar 'by international law' was not liable to suit in English court. See also the French case, *Government of Morocco and Maspero v. Laurens* (1930), *Annual Digest*, 1929-1930, Case No. 75.

<sup>59</sup> [1947] 1 K.B. 41, 50. See above, pp. 70-1.

can be no objection if the British Government, Parliament or Courts should decide that certain of its subject peoples should be immune from the jurisdiction of the court. But such immunity is not immunity according to international law. It is one thing to accord immunity on the grounds of sovereignty, and quite another to accord it as a matter of internal legislation.<sup>60</sup> In the latter case, no recognition as an independent State need be implied.

To return to the question of certification, it may be observed that the British practice, on the whole a sound one, is to treat the certificate from the Executive department as an essential piece of evidence on certain points of fact which are peculiarly within its knowledge, but the legal significance of the testimony and its relevancy to the case would have to be determined by the judiciary. If the judiciary once begins to defer its own conclusion in favour of that of the political department, there will be danger of the courts substituting the criterion of policy for the criterion of law.

This possibility has been ominously foreshadowed in the trend of American decisions. It has steadily been held since *Ex parte Muir* (1921),<sup>61</sup> that, if a claim to immunity by a foreign State is 'recognised and allowed' by the State Department, it is incumbent upon the court to grant the immunity automatically without further inquiry.<sup>62</sup> In making the decision the Executive does not act as mere conduit, but is assuming a judicial or quasi-judicial function<sup>63</sup> from which the Court is ousted.

<sup>60</sup> In the United States, a State of the Union (*Monaco v. Mississippi* (1933), 292 U.S. 313) and the territory of Hawaii (*Kawanawakoa v. Polyblank* (1906), 205 U.S. 349, 353) could not be sued without their consent. In *Sullivan v. State of Sao Paulo, Same v. State of Rio Grande do Sul* (1941), 122 F. (2d) 255, *Annual Digest*, 1941-1942, Case No. 50, constituent States of a foreign federated State were also accorded immunity in the United States (see Lyons, *loc. cit.*, n. 7, p. 225 above). Continental authorities are against immunity (*Annual Digest*, 1941-1942, pp. 187-8; also Feller, *loc. cit.*, p. 92, n. 65). Practice in American courts regarding immunity of political subdivisions lacks uniformity (see cases cited in Moran, Notes, *Immunity of a Foreign Sovereign from Suit: What is a Sovereign State?* 26 Cornell L.Q., 1940-1941, p. 727, at pp. 729-30). See Hackworth, vol. 2, pp. 401-3, and Harvard Research, *Competence of Courts*, 26 A.J.I.L., 1932, Special Supplement, pp. 480-8, for cases and doctrines expressing differing points of view. For comments against immunity, see 40 Mich. L.R., 1940-1941, pp. 912-3; 55 H.L.R., 1941-1942, p. 149.

<sup>61</sup> (1921) 254 U.S. 522. See comments in Feller, *loc. cit.*, p. 83.

<sup>62</sup> See *Compania Espanola v. The Navemar* (1937), 303 U.S. 68, 74.

<sup>63</sup> See Notes—*Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations*—50 Yale L.J., 1940-1941, p. 1088, at p. 1093. Sometimes the Executive has made outright demands for dismissal of suit: *The Schooner Exchange v. M'Faddon* (1812), 7 Cranch 116. Where the State Department



Executive determination of questions of law has also been upheld in cases involving the enforceability of foreign legislation. In one case the court was asked by the Executive to sustain a 'freezing decree' of the Netherlands Government on the ground of the United States policy of co-belligerency.<sup>64</sup> In two cases concerning the Litvinov Assignment,<sup>65</sup> the United States Supreme Court upheld the view that the formulation of public policy by the State Department can change a judicial question into a political one, in which the public policy of the government should prevail.

The facts show obviously that the practice of the United States has been to give precedence to the views of the Executive whenever a case involves elements of foreign relations. There is no question that a statement from the government should be treated as authoritative as regards its relations with certain persons, or States, or Governments, such statement being a statement of fact. But it is quite another matter for the government to say that, given such facts, such persons, States, or Govern-

failed to 'recognise and allow' a claim of immunity (*Compania Espanola v. The Navemar*, *supra*; *Lamont v. Travelers Ins. Co.* (1939), 281 N.Y. 362, 34 A.J.I.L., 1940, p. 349, *Annual Digest*, 1938-1940, Case No. 73; *Ex parte Republic of Peru* (1943), 318 U.S. 578, 588), it has generally been held that the court should be entitled to decide upon the merit of the claim. See, however, criticism of *Lamont* case by Deák (*The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 Col. L.R., 1940, p. 453). In some other cases it has been held that the court may not accord immunity where it is not 'recognised and allowed' by the State Department: *The Pesaro* (1920), 255 U.S. 216, 219; *Republic of Mexico v. Hoffmann* (1945), 324 U.S. 30, 36, 42. See criticism of the latter decision by Jessup (*loc. cit.*, n. 85, p. 239 above, p. 168). It was inferred from those cases that the mere fact of the transmission of the claims of foreign States to the court by the Department implied recognition and allowance of the claim: *Miller v. Ferrocarril del Pacifico de Nicaragua* (1941) (Maine) 18A (2d) 688, *Annual Digest*, 1941-1942, Case No. 51, p. 195. In *Sullivan v. State of Sao Paulo*, *supra*, the Cir. Ct. of App., 2nd Cir., however, held that, while accepting the accuracy of the facts recited in the certificate from the State Department, the court had the right to judge on questions which were not political (*ibid.*, 1941-1942, pp. 186-8). In *The Anghyra* (1941), A.M.C., 1495, *Annual Digest*, 1941-1942, p. 223 n., a Virginian Court, notwithstanding suggestions from the State Department, held that the immunity should be denied, upon the evidence that at the time of the alleged requisition, the vessel was in the possession of the United States Marshal. For a discussion of all these cases, see Lyons, *loc. cit.*

<sup>64</sup> *Anderson v. N. V. Transandine Handelsmaatschappij* (1941), 28 N.Y.S. 2d. 547, (1942) 31 N.Y.S. (2d) 194 (263 App. Div. 705), 289 N.Y. 9, *Annual Digest*, 1941-1942, Case No. 4. Commented on with approval by Kuhn, *The Effect of a State Department Declaration on Foreign Policy upon Private Litigation—the Netherlands Vesting Orders*, 36 A.J.I.L., 1942, p. 651; see also Lyons, *loc. cit.*, pp. 137, 146.

<sup>65</sup> *U.S. v. Belmont* (1936), 301 U.S. 324; *U.S. v. Pink* (1942), 315 U.S. 203, 229-30. [See also *U.S. v. N.Y. Trust Co.* (1946), 75 F. Supp. 583, and *A/S Merilaid & Co. v. Chase Nat. Bank of N.Y.* (1947) 71 N.Y.S. (2d) 377.]

ments ought to be immune from jurisdiction. Despite disclaimers by the Executive of any intention to decide upon questions of law,<sup>66</sup> by dictating the consequences of its relations with foreign powers it has no doubt made important inroads into the function of the court. From a realistic point of view, it may perhaps be convenient to gear the judiciary to active diplomacy. But, from a realistic point of view also, it may be doubted whether it might not be wiser, after all, to retain an independent judiciary as a possible refuge from embarrassing claims of foreign States which the Executive has no intention of conceding. The normal process of international affairs requires exhaustion of local remedies as a preliminary to intervention through the diplomatic channel.<sup>67</sup> The direct intervention of the Executive would leave nothing between it and the unpleasant consequences of a negative decision.

<sup>66</sup> In *Sullivan v. State of Sao Paulo* (1941), the Court remarked that the Department's refusal to recognise its own suggestion as a conclusion of law 'can hardly be more than modest concern not to usurp the constitutional function of the courts' (*Annual Digest*, 1941-1942, p. 185; see Lyons, *loc. cit.*, pp. 133-4).

<sup>67</sup> Jessup, *loc. cit.*, p. 169.



## **PART FIVE**

### ***QUALIFIED RECOGNITION***



## CHAPTER 16

### REVOCABILITY OF RECOGNITION

AS recognition, according to the declaratory view, is an acknowledgment by an old State of the fact of the existence of a new State or government, it is not an act requiring continuous action, but an act consummated the moment it is accomplished.<sup>1</sup> The existence once acknowledged is acknowledged; there is nothing to withdraw, unless, perhaps, the acknowledgment is a mistake in fact. A State or government in possession of the essential requirements of statehood or governmental capacity exists, and continues to exist, independently of recognition or the 'withdrawal' of recognition. The disappearance of any or all of these requirements terminates the existence of the State or government. But such termination of existence is neither the cause nor the result of the termination of recognition. Taking notice of the non-existence of the formerly existing entity by a foreign State is a fresh act of acknowledgment of a new fact, and not the withdrawal of the previous recognition.<sup>2</sup>

If, according to the constitutive view, a State becomes a subject of international law through recognition, it may be supposed that it would be open to the recognising State to withdraw its recognition, and thereby to outlaw, excommunicate and to put to legal death a life which it has once created.<sup>3</sup> Such a theory, if maintained, would be placing a premium upon aggression. It would enable an aggressor State to avail itself of the law of the jungle by first depriving its victim of the protection of international law.\* There is therefore no greater threat to international

<sup>1</sup> Erich, *loc. cit.*, n. 21, p. 15 above, p. 487; below, p. 396.

<sup>2</sup> *Tallinna Laevauhisus v. Estonian State S.S. Line* (1946), 80 Lloyd's List L.R. 99; Kelsen, *loc. cit.*, n. 8, p. 14 above, p. 613. This distinction is not always observed. See Lauterpacht, pp. 350-1; *B. and Others v. Bank of Spain (Burgos)* (1939), Ct. of App., Paris, *Annual Digest*, 1919-1942 (Supplementary Volume), Case No. 42.

<sup>3</sup> Williams points out that, under the constitutive theory, it would also be possible for the 'derecognised' State to 'derecognise' the 'derecognising' State (Williams, *loc. cit.*, n. 29, p. 36 above, p. 61).

<sup>4</sup> On November 18, 1936, the German and Italian Governments withdrew recognition of the Spanish Republican Government and commenced to treat

legal order than the unrestricted notion of the revocability of recognition. It is believed that no constitutive writer is thoroughgoing enough to pursue his logic to such an extreme. [It must not be forgotten, however, that the withdrawal of recognition may also be used 'in the case of persistent violations of International Law by a State. It could be conceived that the international society retaliates by a conscious and collective act . . . equivalent to the outlawry of the delinquent State. . . . Such a step could be taken collectively at an international conference, . . . or individually by the members of the international society.'<sup>5</sup> Obviously the simplest method of outlawing a State which persistently violated the principles of international law would be 'by a withdrawal of its recognition as a subject of International law.']<sup>6</sup>

The impossibility of the situation calls for a modification of the constitutive view. This comes in the form of the suggestion that, while recognition is revocable, the revocation must be conceived not as an arbitrary act of policy, but as one of application of international law, 'namely, as a declaration that the objective requirements of recognition have ceased to exist.'<sup>7</sup> This suggestion no doubt eliminates the possibility of abuse, but is highly detrimental to the constitutive theory. To make the legality of withdrawal dependent upon the non-existence of the objective requirements of international law is tantamount to making the effect of withdrawal dependent upon such non-existence itself. In

it as rebels (Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, 1939, p. 16; *Spanish Republican Government (Security for Costs)* Case (1938), German Ct. of App. of Frankfurt-on-the-Main, *Annual Digest*, 1938-1940, Case No. 28; *Survey of International Affairs*, 1937, vol. 2, pp. 256-7). In 1931 Japan threatened to withdraw recognition from China in order to evade her duties under the Covenant of the League (L.o.N. Off. J. (1932), pp. 383, 384). On November 30, 1940, Japan withdrew recognition of the Government of Chiang Kai Shek in China by signing a treaty with the 'Government' of Wang Ching Wei (*The Times*, December 2, 1940).

<sup>5</sup> [Schwarzenberger, *International Law and Totalitarian Lawlessness*, 1943, pp. 99-100.]

<sup>6</sup> [*Ibid.*, p. 105.]

<sup>7</sup> Lauterpacht, p. 349. [See, for example, the Note addressed by the Soviet Government to the Nationalist authorities in Canton at the time of the Soviet recognition of the communist Government in China: 'Owing to events that have occurred in China which have brought about profound changes in the military, political and social life of the country, as a result of which the Chinese People's Republic has been formed and a Central People's Government of China has been set up, the Government . . . located in Canton has ceased to exercise power in the country, has become a provincial government of Canton, and has lost the right to maintain diplomatic relations with foreign States on behalf of China . . .' (*The Times*, October 3, 1949).]

other words, withdrawal of recognition is conceived as nothing more than the registering of the fact that these requirements have ceased to exist. Such a view of the revocability of recognition is scarcely distinguishable from the declaratory view.<sup>8</sup>

(Another suggestion is that, while *de jure* recognition is definitive, *de facto* recognition may be subject to revocation.<sup>9</sup> The difficulty in maintaining this view lies in the fact that the distinction between *de jure* and *de facto* recognition is political rather than legal.<sup>10</sup> ) From the legal point of view, *de facto* recognition is as much evidence of the existence of the State or government as is *de jure* recognition. The evidence continues to be valid so long as the fact it purports to testify persists. If it turns out that the State or government recognised no longer exists, the evidence of existence must be revised or withdrawn, whether that evidence has been provided by means of *de facto* or *de jure* recognition.<sup>11</sup> An example of the withdrawal of *de jure* recognition may be found in the withdrawal of the recognition of the Rivas Government of Nicaragua by the United States on the dubious ground that the authority of that Government had been contested.<sup>12</sup> On the other hand, in withdrawing the *de facto* recognition of the Armenian Republic of 1920, the United States Government made it clear that it was because 'the Armenian Republic has ceased to exist as an independent State.'<sup>13</sup> (It may be said that the withdrawal of recognition, in the sense of an acknowledgment of the termination of the existence of States or governments, makes no distinction between *de jure* and *de facto* recognitions.)

The acknowledgment by a State of the disappearance of foreign entities often finds outward expression in overt acts of the State, such as the termination of diplomatic relations. These overt

<sup>8</sup> Above, p. 259. Withdrawal of recognition in this sense is merely the reverse application of the general principle of recognition. See Le Normand, *op. cit.*, n. 1, p. 14 above, p. 206, and Schwarzenberger, *op. cit.*, pp. 100-1.

<sup>9</sup> Erich, *loc. cit.*, pp. 487-8; Williams, *loc. cit.*, p. 67; Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 54; Scelle, *op. cit.*, n. 20, p. 15 above, vol. I, p. 103. This also seems to be the view of the Institute of International Law (Resolution of 1936. 30 A.J.I.L., 1936, Supplement, p. 186).

<sup>10</sup> Below, p. 288.

<sup>11</sup> Kelsen, *loc. cit.*, p. 613.

<sup>12</sup> Moore, *Digest*, vol. I, p. 143. The recognition was accorded in May, 1856, a previous recognition in 1855 having been disavowed (*ibid.*, p. 141). The action was criticised by Baty (Baty, *loc. cit.*, n. 49, p. 66 above, p. 483). [For other possible cases, see Schwarzenberger, *op. cit.*, pp. 102-4.]

<sup>13</sup> Hackworth, vol. I, p. 222.



acts have sometimes been regarded as the withdrawal of recognition itself. Although it may be right to say that the continued maintenance of diplomatic relations presupposes continued recognition, the converse is, however, untrue. A State may decide to discontinue relations with another, without the slightest doubt of the latter's existence. Many cases described as 'withdrawals of recognition' in reality belong to this category.<sup>14</sup>

Sometimes, though rarely, what is described as a withdrawal of recognition is in fact a repudiation of recognition. In such a case, there is legally no recognition *ab initio*. It may have arisen out of unauthorised actions of government officials or the misappreciation of facts. Once the misadventure has been discovered and the action disavowed, the recognition must be regarded as having never been accorded. Disavowals of unauthorised recognition have occurred several times in American diplomatic history.<sup>15</sup> The only instance which the present writer is able to call to mind illustrative of the latter situation is the withdrawal of the British recognition of the Italian Government in Ethiopia.<sup>16</sup>

What can be the explanation of the British action? The official justification was that the entry of Italy into the war liberated Great Britain from her former undertakings.<sup>17</sup> It is doubted, however, whether recognition is in the nature of an agreement and whether it is automatically terminable by war. Another explanation is that the destruction of the object of the previous recognition, which was the achievement of a general peace settlement, by the entry of Italy into the war justified the British withdrawal.<sup>18</sup> This, too, can hardly be maintained. The only legitimate consideration for the withdrawal of recognition is

<sup>14</sup> See cases cited in Lauterpacht, pp. 354-5. [See also Schwarzenberger, *op. cit.*, pp. 103-4, concerning relations between France and Finland, 1918-1919.]

<sup>15</sup> See above, p. 230, n. 39.

<sup>16</sup> See *Azazh Kebbeda Tesema v. Italian Government* (1940), Palestine Sup. Ct., 7 Palestine L. Rep. 597, *Annual Digest*, 1938-1940, Case No. 36. [Cf., however, British statements concerning Austria; On March 16, 1938, Viscount Halifax announced: 'H.M.G. . . . recognise that the Austrian State has now been abolished as an international authority.' In the Moscow Declaration, November 1, 1943, the British Government announced: 'They regard the annexation imposed upon Austria by Germany on March 15, 1938, as null and void' (see Langer, *op. cit.*, n. 28, p. 60 above, pp. 174-182). It is doubtful, however, how far either of these instances may be compared to the American cases quoted above.]

<sup>17</sup> Under-Sec. of State Butler, statement in the House of Commons, June 19, 1939 (Parl. Deb., H.C., 5th ser., vol. 362, col. 139).

<sup>18</sup> Lauterpacht, p. 356.

the disappearance of the requirements of statehood or governmental capacity. The motives or objects of the original diplomatic act embodying the recognition ought not to be taken into consideration. The British recognition of the United States was said to be a price paid in exchange for peace.<sup>19</sup> It cannot be suggested that Great Britain was entitled to withdraw this recognition on the ground that the United States had made war against her, as in 1812.

The British action was, however, not without exonerating circumstances. The authority of Emperor Haile Selassie in Ethiopia had been reduced to such a point that its elimination might be considered as almost complete, had the development not been interrupted by the outbreak of the European war. It might be argued on behalf of Britain that her previous recognition was based upon her appreciation of the fact of the disappearance of the Ethiopian authority. But, to be logically consistent, she would have to adhere to the conclusiveness of the recognition of the Italian Government, and to regard all acts of that Government in Ethiopia prior to its eventual and complete overthrow as acts of the *de jure* Government. Haile Selassie, in order to have his acts recognised in England as acts of the ruler of Ethiopia, would be obliged to win his title by conclusively ousting the previous *de jure* government of Italy. This position was apparently not taken by the British Government. The withdrawal of the recognition of the Italian conquest of Ethiopia<sup>20</sup> took place quite some time before the effective rule of Italy over Ethiopia was actually overthrown.<sup>21</sup> The position of the British Government must therefore be interpreted in the light of an admission of an error of judgment, a disavowal of the previous act of recognition, and a confirmation of the continuation without break of the *de jure* authority of Haile Selassie, hampered temporarily by the military occupation of Italy. [In fact, this was clearly recognised in the 'Notes on Policy and Practice in respect of Occupation of Italian East Africa' issued by the Chief Political Officer, Middle East Forces, on February 8, 1941. Paragraph 6 of this document stated: 'As His Majesty's

<sup>19</sup> Moore, *International Adjudications*, vol. 3, p. 303.

<sup>20</sup> As evidenced by the letter of the High Commissioner of Palestine, November 30, 1940, in *Azazh Kebbede Tesema v. Italian Government*, *supra*.

<sup>21</sup> Italian resistance in East Africa did not end until November 28, 1941. See Woolbert, *The Future of Ethiopia*, 20 *Foreign Affairs*, 1941-1942, p. 535.

Government have withdrawn their recognition of the Italian conquest, it may be correct to say that *de jure* any part of Ethiopia which is cleared of the enemy comes *ipso facto* and at once under the rule of the Emperor.' In practice, however, it was necessary for Ethiopia to be placed under the interim control of the British military authorities.] <sup>22</sup>

<sup>22</sup> [Lord Rennell, *British Military Administration in Africa, 1941-1947*, 1948, pp. 45-6, 61-7.]

## CHAPTER 17

### CONDITIONAL RECOGNITION

ACCORDING to Hall, conditional recognition may be one of two kinds: a recognition attached with conditions precedent, or a recognition attached with conditions *sub modo*. In the former case, recognition may be withdrawn on the ground of the non-fulfilment of the conditions; in the latter case, violation of the terms merely entitles the recognizing power to enforce them by means of a rupture of diplomatic relations or intervention.<sup>1</sup>

Most cases which have been mentioned under the heading of conditional recognition are in reality recognitions *sub modo*. Recognised powers thereby undertake to carry out certain obligations accepted at the moment of recognition. Those obligations may include the maintenance of a perpetual neutrality,<sup>2</sup> abstention from the slave trade,<sup>3</sup> the adoption of certain forms of government,<sup>4</sup> the accordence of most-favoured-nation treatment,<sup>5</sup> the retention of capitulatory privileges,<sup>6</sup> the maintenance of a régime of free trade,<sup>7</sup> the respect of private property,<sup>8</sup> the

<sup>1</sup> Hall, p. 113. A similar distinction is made by Rivier, who, however, restricts the term 'conditional recognition' to the former case, and calls the latter 'recognition accompanied by a *mode*' (*op. cit.*, n. 23, p. 15 above, vol. I, p. 60; approved in Moore, *Digest*, vol. I, pp. 73-4). Also Nys, *loc. cit.*, n. 21, p. 15 above, p. 296.

<sup>2</sup> See Article 7, Treaty of London, November 15, 1831, with respect to the neutralisation of Belgium (18 B.F.S.P., 1830-1831, p. 651).

<sup>3</sup> See British recognition of Brazil (Smith, vol. I, p. 186) and Texas (*ibid.*, p. 249).

<sup>4</sup> The recognition of the Czechoslovak Government by Britain, July 18, 1941, was accompanied by the undertaking to submit to a democratic constitution (Lauterpacht, p. 358). In return for recognition by the United States, the Solorzano Government in Nicaragua pledged itself on December 12, 1924, to hold fair elections (Hackworth, vol. I, pp. 193-4). [See also the decision of the Crimea Conference, February, 1945, concerning British and American recognition of the Polish Government (Cmd. 7088 (1947), para. 7).]

<sup>5</sup> See American recognition of Albania and Egypt in 1922 (Hackworth, vol. I, pp. 192-3).

<sup>6</sup> See American recognition of Egypt (*ibid.*).

<sup>7</sup> See Article I of the General Act of Berlin, 1885, regarding Free Trade in the Congo (Hertslet, *Map of Africa by Treaty*, 1894, vol. I, p. 24).

<sup>8</sup> See United States recognition of the Busch Government in Bolivia, 1937 (Hackworth, vol. I, p. 228).

guarantee for specified treatment of minorities,<sup>9</sup> and other undertakings of a political or commercial nature.<sup>10</sup> Such a recognition *sub modo* is not 'conditional recognition' in the strict sense of the word. It is neither suspensive nor resolutive. Failure to discharge the obligations attached does not affect the recognition, which is an act accomplished beyond redemption. As evidence of the fact of the existence of a State or government, recognition is irrevocable. The consequence of non-fulfilment of 'conditions' is rather like the non-fulfilment of other obligations accepted *after* recognition, the enforcement of which, whether taking the form of a diplomatic rupture or some forcible measure, does not affect, as it cannot affect, the legal personality of the entity recognised.<sup>11</sup> These 'conditions' are practically indistinguishable from undertakings accepted by States as agreed arrangements for the renewal of diplomatic relations previously severed. Such considerations have led many writers on international law to the conclusion that there is no such thing as 'conditional recogni-

<sup>9</sup> By the Treaty of Berlin, 1878, the new States therein recognised were placed under special obligations regarding minorities. See Articles 5, 27, 35, 44 of the Treaty (69 B.F.S.P., 1877-1878, p. 749). See also the post-war treaties of 1919: Versailles Treaty, Article 86 (De Martens, N.R.G. 3e ser. XI (1923) 400); Treaty of St. Germain, Article 51 (*ibid.*, p. 706), Article 57 (*ibid.*, p. 707) and Sect. V (*ibid.*, p. 709).

<sup>10</sup> The Soviet Government, in consideration for United States recognition, gave assurances regarding the prevention of subversive activities against the United States, the protection of religious rights of American citizens in Russia, the right of legal protection and the right to obtain economic information, see documents in 28 A.J.I.L., 1934, Supplement, p. 1 *et seq.* It was with reference to these 'conditions' that the United States Supreme Court said: 'Recognition is not always absolute; it is sometimes conditional' (*U.S. v. Pink* (1942), 315 U.S. 203, 229). Yugoslavia in 1919 (Hackworth, vol. I, p. 221) and Armenia in 1920 (*ibid.*, p. 222) were recognised by the United States on the condition that the question of frontiers be left for future settlement. Similarly, the British recognition of Finland (Lauterpacht, p. 361). In 1922, Lithuania was recognised *de jure* by the Conference of Ambassadors on the condition that she accept the provisions of the Treaty of Versailles (Articles 331 to 345) concerning the navigation on the River Niemen (Hackworth, vol. I, pp. 201-2).

<sup>11</sup> See Hyde, 1st ed., vol. I, s. 38, quoting Oppenheim, 2nd ed., vol. I, s. 73 (this reference is omitted from Hyde, 2nd ed.); Williams, *La Doctrine de la Reconnaissance en Droit International et ses Développements Récents*, 44 *Hague Recueil*, 1933, p. 203, at p. 262; Article 6 of the Resolution of the Institute of International Law, 1936 (30 A.J.I.L., 1936, Supplement, p. 186. Possibly the reference here is to the *de jure* recognition alone). In 1935, the United States protested to the Soviet Union against breach of conditions of recognition regarding attacks on the United States economic and social systems. But the United States did not regard the recognition as rescinded (Garner, *U.S.A. and Soviet Union—A Protest*, 17 B.Y.I.L., 1936, p. 184). The fact that terms can be exacted from and accepted by a new entity prior or at the time of recognition is positive proof that it had juridical existence independently of recognition.

tion'.<sup>12</sup> Nys boldly declares that 'conditional recognition' is a legal impossibility.<sup>13</sup>

It is perhaps not justifiable to come to such a conclusion without an examination of a further group of cases which are more in conformity with Rivier's definition of 'conditional recognition'. This includes cases where conditions precedent are attached to the recognition, without the fulfilment of which the recognition does not take effect. This is not to be confused with cases where demands are made prior to any recognition. In these latter cases, recognition only takes place after the demands have been satisfied; otherwise, there would be no recognition at all.<sup>14</sup> The class of cases under consideration, however, is one in which recognition is actually accorded, but is supposed to be accompanied by a suspensive condition. Since recognition is not a juristic act creating legal effects, theoretically there can be no such case. The point is brought up only to be refuted. An example that comes nearest to this kind of recognition may be found in the recognition of Latvia by Germany in 1920. In the Convention of July 15, 1920, between the two States, Germany declared her readiness to recognise Latvia *de jure* as soon as one of the Principal Allied and Associated Powers, signatories of the Treaty of Versailles, had so recognised.<sup>15</sup> Those who regard as a distinctive feature of *de facto* recognition the circumstance that it may have conditions attached to it are

<sup>12</sup> Goebel, *op. cit.*, n. 21, p. 15 above, p. 65; Lauterpacht, pp. 362-4, and authorities cited therein. See also Project II, Article 6, of the International Committee of Jurists (22 A.J.I.L., 1928, Special Supplement, p. 240) and Article 6 of the Montevideo Convention, 1933 (28 A.J.I.L., 1934, Supplement, p. 76), which declare that recognition is 'unconditional and irrevocable'.

<sup>13</sup> Nys, *loc. cit.*, p. 297.

<sup>14</sup> In 1824, France suggested to Colombia that she would recognise the latter upon the condition of the latter's establishing a monarchy (Wharton, *Digest*, vol. I, pp. 524-5). In 1830, Great Britain offered to recognise Dom Miguel on the condition that the latter granted an amnesty to his political opposition (Smith, vol. I, p. 178). In 1913 and 1921, respectively, the United States proposed to recognise the Huerta and Obregón Governments in Mexico upon the latter's complying with certain demands (Hackworth, vol. I, pp. 257, 261). In March, 1946, the United States notified the Government of Bulgaria that it could not expect to be recognised unless two members of the opposition were included in the Government (*The Times*, March 11, 1946). [In April, 1948, President Truman promised recognition to the new King of the Yemen if he would pledge himself to fulfil the 1946 Yemeni-American treaty of commerce and friendship, 'such assurance would accomplish recognition' (United States Information Service, *Release*, April 22, 1948).]

<sup>15</sup> 113 B.F.S.P., 1920, p. 1059.

perhaps inclined to include *de facto* recognition so conceived as frequent examples of 'conditional recognition'.<sup>16</sup>

In cases where a suspensive condition is attached to an act of recognition, the recognition, in the sense of a mental apprehension of the existence of a fact, must be considered as having been accomplished at once, although recognition, in the sense of an initial step in the establishment of political relations, may be regarded as having been suspended pending fulfilment of the condition. A State recognising another conditionally is, in effect, saying: Mentally, I appreciate your existence, but I shall not say so, nor take any step to establish relations with you upon the basis of that existence, until such-and-such a condition has been met. The mental appreciation of a fact cannot be subject to conditions. To say that a State or government might exist at a future date or upon the materialisation of certain events is to say that it does not exist.<sup>17</sup> Hence, to say that the existence of a State or government cannot be mentally apprehended until a certain condition has been met is, for the moment, at least, a refusal to recognise.<sup>18</sup>

On the other hand, if the recognising State has, by its act of recognition, clearly indicated its apprehension of the existence of the recognised State or government, the evidence of the existence of that State or government must be considered as having been established, although there may be no intention to establish political relations. Legal consequences of such existence must necessarily follow, even if the condition for recognition may not have been met. Courts which hold that the municipal effects of *de facto* recognition are the same as those of *de jure* recognition in certain matters<sup>19</sup> must have regarded the evidence of the existence of the new State or government as having been conclusively

<sup>16</sup> Below, p. 280 *et seq.*

<sup>17</sup> Baty: 'It is impossible to recognise a fact conditionally. Either it is a fact or it is not. The very essence of recognition is that the recognising State thereby declares that it has satisfied itself that the recognised authority possesses the distinguishing marks of a State. To say that one recognises that it has them, subject to their being subsequently proved, is a contradiction of terms. To say that one recognises that it has them, subject to its conduct being satisfactory in other particulars, is sheer nonsense. It is like telling a pupil that her sum is right if she will promise to be a good girl' (Baty, *loc. cit.*, n. 49, p. 66 above, p. 470). [Cf., American recognition of the King of Yemen, n. 14 above.]

<sup>18</sup> Le Normand, *op. cit.*, n. 1, p. 14 above, p. 240.

<sup>19</sup> Below, pp. 283-4.

borne out by the *de facto* recognition, whatever conditions may have been attached to it.

In conclusion, it may be said that 'conditional recognition' is a misuse of terms. A recognition subject to the materialisation of uncertain future events may be regarded, so far as legal consequences are concerned, as a simple recognition or as no recognition at all, according to whether the act indicates that in the mind of the recognising State the object of recognition had existence. A recognition *sub modo* is legally possible, but the non-fulfilment of its terms does not affect the juridical existence of the body recognised. Whatever their views of the legal significance of conditional recognition, international lawyers are unanimous in condemning the practice of States in exacting special privileges from nascent States or governments in consideration for recognition.<sup>20</sup> Whether it be called 'conditional recognition' or political blackmail, the practice is equally objectionable, for the reason that it pollutes from the very outset the atmosphere of international friendship, which it is the avowed purpose of recognition to build and to consecrate.

<sup>20</sup> Above, pp. 126-7. Lauterpacht, pp. 32-8, 360-2; Le Normand, *op. cit.*, p. 244.



## CHAPTER 18

### DE FACTO AND DE JURE RECOGNITION

THE confusion which envelops the question of *de facto* recognition is due not so much to the unsettled state of the principle involved, as to the nebulous nature of the term.<sup>1</sup> Referring to this question, Borchard said: 'The subject has been unduly complicated by chameleonic uses of the term *de facto*, which has been applied promiscuously to *de facto* authorities in the field, to governments not established by constitutional methods, and as an adjective to qualify recognition. . . .'<sup>1a</sup> The clarification of terminology must be regarded as the first step towards the understanding of the question.<sup>2</sup> For this purpose it is necessary to draw distinctions between the notions of *de facto* government in the constitutional law sense, *de facto* government in the international law sense, and *de facto* recognition. Not infrequently the terms '*de facto* recognition' and 'recognition as (or of) a *de facto* government' have been used indiscriminately to cover all three notions, thereby giving rise to infinite confusion. It is believed that, once the difficulties of distinctions and terminology are overcome, the principles would emerge of themselves.

#### § 1. THE INTERNATIONAL AND THE CONSTITUTIONAL SENSE OF THE TERM

The terms '*de jure*' and '*de facto*' recognition had already come into Anglo-American terminology by the time of the revolt

<sup>1</sup> The vagueness of the term '*de facto* recognition' has been a constant source of irritation to international lawyers. See, for example, Erich, *loc. cit.*, n. 21, p. 15 above, p. 484; Kelsen, *loc. cit.*, n. 8, p. 14 above, p. 612; Scelle, *op. cit.*, n. 20, p. 14 above, vol. I, p. 102; Lauterpacht, p. 329; Briggs, *De Facto and De Jure Recognition: The Arantzazu Mendi*, 33 A.J.I.L., 1939, p. 680, at p. 689; Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 54.

<sup>1a</sup> Borchard, Review of Stille, *Die Rechtsstellung der de-facto-Regierung in der englischen und amerikanischen Rechtsprechung*, 1932, 26 A.J.I.L., 1932, p. 926, at p. 927.

<sup>2</sup> In the First Assembly of the League of Nations, one delegate suggested that the term '*de jure* recognition' should be defined. The suggestion was, however, not acted upon (L.o.N. *Records of First Assembly*, Plenary Meetings (1920), pp. 578, 623, 636).

in Spanish America. A British Foreign Office instruction for the British plenipotentiary at the Congress of Verona, dated August 8, 1822, distinguished between three stages of recognition: '1st. The Recognition *de facto* which now substantially subsists. 2nd. The more formal Recognition of Diplomatic Agents. 3rd. The Recognition *de jure*, which professes to decide upon the Title, and thereby to create a certain Impediment to the assertion of the Rights of the former Occupant.'<sup>2a</sup> At about the same time, President Monroe in his message to Congress declared that the policy of the United States in regard to Europe was 'to consider the Government *de facto* as the legitimate Government for us'.<sup>3</sup> In 1829, in an instruction to the American diplomatic representative in Colombia, Secretary Van Buren said: 'So far as we are concerned, that which is the Government *de facto* is equally *de jure*.'<sup>3a</sup>

By themselves, the terms '*de jure*' and '*de facto*' can, no doubt, with equal propriety, be used with reference to constitutional law as well as international law. In the constitutional law sense, a '*de jure* government' is synonymous with 'legitimate' or 'constitutional' government; while a '*de facto* government' is equivalent to an 'actual' or 'usurping' government. In the days of hereditary rulers, the constitutional legality of a government carried with it a certain measure of legality in international law. A ruler, deprived of actual control of his country, would nevertheless remain the *de jure* sovereign, while persons carrying on the actual administration would be regarded as 'usurpers', both constitutionally and internationally.<sup>4</sup> With the decay of the doctrine of dynastic legitimacy in constitutional law, constitutional legality is no longer made the test of the international title to govern. There can be no *a priori* claim; the title to rule is to be determined by the fact of actual governing. Hence the constitutional law test of legality should have no significance whatever in the consideration of international recognition.<sup>5</sup> Since

<sup>2a</sup> Smith, vol. I, p. 125.

<sup>3</sup> Quoted in Williams, *loc. cit.*, n. 29, p. 36 above, p. 60.

<sup>3a</sup> Wharton, *Digest*, vol. I, p. 530.

<sup>4</sup> See Grotius, *op. cit.*, Bk. 1, Ch. IV, ss. 15-9.

<sup>5</sup> Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 2; de Visscher, *Les Gouvernements Etrangers en Justice*, 3 R.I., 1922, p. 149, at p. 156; Rougier, *op. cit.*, n. 2, p. 97 above, p. 496, n. 1. However, in Bernard's widely quoted definition, constitutional legality still seems to be the distinguishing feature of a *de jure* government: 'A *de jure* government is one which, in the opinion of the person

the terms '*de jure*' and '*de facto*' have reference to constitutional law only, it has been suggested that the distinction should be disregarded in the question of international recognition.<sup>6</sup>

The alternative to abolishing the terms altogether in all references to the question of recognition is to use it in the international law sense. International law, in order to prevent a legal vacuum, recognises the necessity of treating a government already established as representing the State, although its authority may be at times partially and temporarily undermined by insurgent activities. This is not because the established government is constitutionally legitimate (although, incidentally, it would be), but rather because the insurgent authorities have not succeeded in establishing themselves in its place. (As long as this situation persists, the established government is internationally the *de jure* government; the insurgents remain, at most, a *de facto* government over a specified portion of the territory.)<sup>7</sup>

In principle, therefore, when we speak of '*de jure*' or '*de facto*' with reference to a State or government, it is only legitimate to use it in this sense. But, in practice, from the early literature on recognition to the present time, the use has been indiscriminate. Thus, in the remarks of President Monroe and Secretary Van Buren quoted above,<sup>8</sup> the obvious meaning is that a foreign government, although it may be *de facto* in the constitutional sense, may, nevertheless, be regarded as *de jure* in the international sense. The use of the two terms in different senses in the same sentence is most likely to create confusion.<sup>9</sup> Even those who profess to adopt a principle of recognition without regard to constitutional legitimacy have often been unable to avoid using

using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious' (*Neutrality of Great Britain during the American Civil War*, 1870, p. 108, quoted in *Luther v. Sagor* [1921] 3 K.B. 532, 543). See also Ralston (*Law and Procedure of International Tribunals*, 1926, ss. 549-50, 556), who seems also to regard a *de facto* government as one without constitutional basis.

<sup>6</sup> Noël-Henry, *op. cit.*, s. 222.

<sup>7</sup> Baty, *op. cit.*, n. 21, p. 15 above, p. 207.

<sup>8</sup> Above, p. 271.

<sup>9</sup> This criticism may be applied to the remark of Nielsen in his dissenting opinion in *Oriental Navigation Co.* (1928): 'A new régime or government may gain control of a country and be the *de facto*, and from the standpoint of International Law therefore the *de jure* government . . . ' (23 A.J.I.L., 1929, p. 434, at p. 440).

the terms ' *de facto* ' and ' *de jure* ' in the constitutional law sense. Thus, Canning described the successive governments in France after the downfall of the Bourbons as ' Governments *de facto* '.<sup>10</sup> Borchard refers to the Governments of Cromwell and Napoleon I as ' *de facto* governments '.<sup>11</sup> To call a government exercising unopposed power in the country even a ' general *de facto* government ' is to signify that its power is not constitutionally legitimate. In the international law sense such a government is a *de jure* government.<sup>12</sup> In *Republic of Peru v. Peruvian Guano Co.* (1887) the plaintiffs denied the validity of an act done by ' the *de facto* Government of the Republic which was not the *de jure* Government ', although it was admitted that the ' *de facto* government ' had been recognised by the sovereign of the forum. The plaintiffs apparently confused the lack of constitutional legitimacy of the government with the lack of international capacity. They were told by the court that their argument was untenable.<sup>13</sup> The fact that that Government was recognised by a foreign State indicates that, in the eyes of the recognising State, the government in question, *de facto* as it may be in municipal law, was *de jure* in international law. The bringing of the notion of constitutional legitimacy into the discussion of the question of international recognition is merely to confuse the issue.

## § 2. *De Facto* RECOGNITION AND RECOGNITION AS A *De Facto* GOVERNMENT (OR STATE)

( The phrase ' *de facto* (or *de jure*) recognition ' is descriptive of the character of the act of recognition, and the phrase ' recognition as a *de facto* (or *de jure*) government (or State) ' is descriptive of the character of the thing recognised. They belong to entirely different categories of ideas.<sup>14</sup> ) If we use the term ' *de jure* government ' in the international law sense, as urged above, it would

<sup>10</sup> Smith, vol. I, p. 167.

<sup>11</sup> Borchard, *Diplomatic Protection of Citizens Abroad*, 1928, p. 206.

<sup>12</sup> ' The rebels may constitute, by their temporary assumption of the control of a part of the territory, a *de facto* government, with which other countries may have necessary but most stringently restricted and unofficial relations. But the government controlling the *whole* of its territory must necessarily be a *de jure* government; its *jus* flows from the fact of its complete supremacy. A merely *de facto* government is therefore, in International Law, always an imperfectly successful government ' (Baty, *op. cit.*, p. 207).

<sup>13</sup> (1887) 36 Ch. D. 489, 497.

<sup>14</sup> Williams, *loc. cit.*, p. 66.

mean a government exercising unrivalled control over the whole territory. Such a government can only be 'recognised as a *de jure* government', and never as 'a *de facto* government', because a *de facto* government is, by definition, a partial government).

(However, it is usual for a government exercising unrivalled control to be 'recognised *de facto*'.) Thus the Soviet Government in Russia was recognised by Great Britain *de facto* in 1921, and *de jure* in 1924. The character of the Soviet Government was unchanged, but the character of the recognition was different. Conversely, (a '*de facto* government' (either a belligerent community or a military occupant),<sup>15</sup> being, by definition, a partially successful government, is not entitled to be recognised as a State government, either *de facto* or *de jure*.) '*De facto* government' is often used as an equivalent to a government of which recognition is wanting.<sup>16</sup> To say that a *de facto* recognition is recognition as a *de facto* government is an obvious contradiction in terms.

This logic must follow from the acceptance of the distinction, in the international law sense, between '*de jure*' and '*de facto*' governments. Since that distinction has not been universally followed, it cannot be expected that the distinction between '*de jure* (or *de facto*) recognition' and 'recognition as a *de jure* (or *de facto*) government' will be observed. As a matter of fact, these two phrases have frequently been used interchangeably by numerous authorities. Sir Arnold McNair, for example, lends his full authority to the equating of the two phrases, saying that: 'It is not the recognition which is *de jure* or *de facto*, but the Government or situation. On that understanding we may use the convenient expression recognition *de jure* and recognition *de facto*.'<sup>17</sup> Similar views have been expressed by Noël-Henry,<sup>18</sup>

<sup>15</sup> See below, p. 291.

<sup>16</sup> Noël-Henry, *op. cit.*, n. 320. Hall mentions that the surrender of criminals to a '*de facto* government' does not constitute recognition (p. 109, n. 1). United States courts frequently referred to the Confederacy and the Soviet Government before 1933 as '*de facto* governments'. See Cardozo J. in *Sokoloff v. National Bank of New York* (1924) (Cases, p. 160). Referring to the effect of recognition, Stone C.J. said that such effect 'operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*' (*U.S. v. Pink* (1941), 315 U.S. 203, 252. Italics added.).

<sup>17</sup> McNair, *Legal Effects of War*, 1948, p. 353, n. 1.

<sup>18</sup> Noël-Henry, *op. cit.*, s. 50.

Hervey,<sup>19</sup> Lauterpacht,<sup>20</sup> and Scelle.<sup>21</sup> Sir John Fischer Williams notes, not without regret, that this view has been accepted in the current language of high legal and political authorities.<sup>22</sup> Thus, Kay L.J. remarked in *Republic of Peru v. Dreyfus Bros. and Co.* (1888) that "The French Government had recognised Senor Pierola's Government *as the de facto government of Peru*".<sup>23</sup> In *Luther v. Sagor* (1929) Bankes L.J. tried to find out the legal effect of 'the recognition by His Majesty's Government in April, 1921, of the Soviet Government *as the de facto Government of Russia*' upon the past acts of that Government.<sup>24</sup> In *Princess Paley Olga v. Weisz* (1929) the English Court of Appeal was informed that the Soviet Government in 1924 'had been recognised by the British Government *as the de jure Government of Russia*, and in 1918—or the end of 1917—*as the de facto Government*'.<sup>25</sup> Here, what the court was considering is the effect of the 'de facto recognition', and not that of the 'recognition as a de facto government'. Either in the sense of constitutional law or in the sense of international law, to speak of the recognition of the Soviet Government as a *de facto* government in 1921 and as a *de jure* government in 1924 is incorrect. For in constitutional law, the Soviet Government was just as illegal in 1924 as in 1921; in international law, its authority was nation-wide, and not partial, in both periods. The character of the authority it exercised in both periods was the same. The difference in the situation in 1921 and 1924 was solely one of the attitude of the British Government towards it, as manifested in its *de facto*, and later *de jure*, recognition. The British Government may have had reason to believe that the Soviet Government's authority in Russia had been more precarious in 1921 than 1924, yet the

<sup>19</sup> Hervey, *op. cit.*, n. 1, p. 135 above, p. 12.

<sup>20</sup> Lauterpacht, p. 330.

<sup>21</sup> Scelle, *Règles Générales du Droit de la Paix*, 46 *Hague Recueil*, 1933, p. 327, at p. 389. This also seems to be the view of Professor Brierly. But after stating that the terms '*de jure*' and '*de facto*' should apply to things recognised rather than to the act of recognition, he says that *de facto* recognition may be accorded in cases where the recognising State has doubts or political reasons for not wishing to treat the recognised power with too great cordiality (*Law of Nations*, 1949, p. 131). Then, it seems, the recognition *de facto* is not determined by the character of the object recognised.

<sup>22</sup> Williams, *loc. cit.*, p. 68.

<sup>23</sup> (1888) 38 Ch. D. 348. Italics added.

<sup>24</sup> [1929] 3 K.B. 532, 541. Italics added.

<sup>25</sup> (1929) 45 T.L.R. 365, 366. Italics added.

character of the Soviet régime as the general State government, and not a local *de facto* government, even in 1921, must certainly be without question.

In two English cases concerning the Ethiopian War and the Spanish Civil War, the converse situation obtained.<sup>26</sup> The position of the 'governments' recognised was that of '*de facto* governments' (in the international law sense, *i.e.*, a military occupant in the first case,<sup>27</sup> and a belligerent community in the second).<sup>28</sup> The court, however, following the principles of *Luther v. Sagor* (1929)<sup>29</sup> and *White, Child & Beney, Ltd. v. Eagle Star and British Dominions Insurance Co., Ltd.* (1922),<sup>30</sup> treated them as State governments, recognised *de facto* by the British Government.<sup>31</sup> In *Haile Selassie v. Cable and Wireless, Ltd. (No. 2)* (1939) Sir W. Greene, M.R., again used the phrases '*de facto* recognition' and 'recognition as a *de facto* government' interchangeably. He said: 'Further, it is not disputed that that right of succession is to be dated back at any rate to the date when *the de facto recognition, recognition of the King of Italy as the de facto sovereign of Abyssinia*, took place.'<sup>32</sup>

(In view of such a formidable usage in equating '*de facto* recognition' with 'recognition as a *de facto* government', it is perhaps impossible to reverse the trend, or to discard the usage, although it may be more logical to do so. Yet it is necessary to point out that the phrase 'recognition as a *de facto* government', while usually used as equivalent to '*de facto* recognition', has sometimes been used to mean that the body recognised is a partially successful government.) One must be careful to see

<sup>26</sup> *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. 513; *Banco de Bilbao v. Sancha* [1938] 2 K.B. 176.

<sup>27</sup> The British Government 'recognised the Italian Government as being in fact (*de facto*) the government of the area then under Italian control' ([1937] Ch. 513, 519). Italics added.

<sup>28</sup> The Foreign Office letter of February 17, 1938, stated that the Franco Government was recognised 'as the government which exercises *de facto administrative control over a considerable portion of the Basque country*' ([1938] 2 K.B. 176, 181). Italics added.

<sup>29</sup> [1921] 3 K.B. 532.

<sup>30</sup> (1922) 38 T.L.R. 367.

<sup>31</sup> In the Ethiopia case, Clauson (then Mr. Justice) said: '... the recognised *de facto* government must for all purposes ... be treated as a duly recognised foreign sovereign state ...' ([1937] Ch. 522). In the Spanish case, the same learned judge (then Lord Justice) said: 'This court is bound to treat the acts of the government which His Majesty's Government recognises as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government' ([1938] 2 K.B. 196).

<sup>32</sup> [1939] Ch. 182, 197. Italics added.

that the one, and not the other, meaning is intended. Thus, in *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937) and *Banco de Bilbao v. Sancha* (1938), the Foreign Office statement did not amount to a recognition of the authorities in question as State governments, but rather as local *de facto* authorities over specified areas of territory.<sup>33</sup> In *Haile Selassie v. Cable and Wireless, Ltd. (No. 2)* (1939) the Foreign Office stated that the Italian Government was recognised 'as the government *de facto* of virtually the whole of Ethiopia'.<sup>34</sup> (In *The Arantzazu Mendi* (1939) it recognised the Nationalist régime 'as a government which at present exercises *de facto* administrative control over the larger portion of Spain'.<sup>35</sup> It is quite clear that what the Government recognised were mere local *de facto* authorities.<sup>36</sup> The judgments of the courts in treating them as recognitions *de facto* of State governments have obviously been due to the lack of precision in the terminology. The result of this confusion in terminology is serious. It blurs the line between the legal status of a State government and a local *de facto* authority.<sup>37</sup>)

### § 3. *De Jure* RECOGNITION AND *De Facto* RECOGNITION

Owing to the confusion in the meaning of the terms '*de jure*' and '*de facto*', there is consequently a lack of agreement regarding the distinctive features which characterise the two situations: '*de jure* recognition' and '*de facto* recognition'. However, assuming that '*de jure*' and '*de facto*' when used in connexion with recognition should be understood in the international sense, it is not difficult to dismiss at once some of the suggested distinctions. First, it may be stated that [the distinction does not lie in the constitutionality of the régime.] Professor Lauterpacht explains with great lucidity that, unless the notion of recognition be detached from the constitutional issue, either there can be no

<sup>33</sup> Above, notes 27, 28.

<sup>34</sup> [1939] Ch. 183. Italics added. The words 'virtually the whole of Ethiopia' may be interpreted in the light of a statement, by Butler, Under-Secretary, in the Commons, March 17, 1938, that 'H.M. Government, since December, 1936, recognised the Italian Government as the Government *de facto* of the parts of Abyssinia which they control' (Parl. Deb., H.C., 5th ser., vol. 333, col. 617).

<sup>35</sup> [1939] A.C. 256, 264. Italics added.

<sup>36</sup> See the announcement of the Prime Minister regarding the recognition of the Spanish Nationalists, above, p. 236.

<sup>37</sup> See below, p. 293 *et seq.*



*de jure* recognition at all, since every government must have originated in a more or less distant past from revolution, or the distinction would be reduced to a mere technicality by recognising *de jure* all subsequent governments except the first revolutionary government.<sup>38</sup> It is indeed true that a government *de jure* in the international sense normally<sup>39</sup> carries with it the quality of constitutional legitimacy. But that is merely incidental. Once a dispossessed government is deprived of all reasonable hope of return, whatever its claims of constitutional legitimacy they would be of no avail.

Secondly, the distinction does not lie in the circumstance that recognition *de facto* carries with it the recognition of the 'enjoyment of sovereign rights' but not the 'exercise' of them, unless recognised *de jure*.<sup>40</sup> Since this distinction has been suggested as the distinction between recognition and non-recognition,<sup>41</sup> it is difficult to see how it can be applied to the differentiation between *de jure* and *de facto* recognition, unless it be assumed that a *de facto* recognition is no recognition at all.)

Thirdly, the distinction does not lie in the mode in which the recognition is accorded.) The contrary view has been held by a number of authorities. Thus, Fauchille identifies *de jure* recognition with express recognition and *de facto* recognition with implied recognition.<sup>42</sup> A similar view is also expressed by Hershey when he speaks of the appointment of consuls as merely implying *de facto* recognition, while the granting of exequaturs implies full recognition.<sup>43</sup>

It is true that *de facto* recognition is more likely to be tacit

<sup>38</sup> Lauterpacht, p. 265.

<sup>39</sup> In exceptional cases, a government *de jure* in the international sense may not be *de jure* in the constitutional sense, as, for example, the case of a successful *coup d'état* by the Head of the State (see Le Normand, *op. cit.*, p. 275). See the case of the Balmaceda Government in Chile, 1891, which was denounced by the Congressionalists as unconstitutional but was treated as *de jure* by the Powers (Rougier, *op. cit.*, p. 496). Sometimes it is not clear which of the parties carries on the constitutional continuity, as in the case of Spain during the Napoleonic War (Moore, *Digest*, vol. I, p. 131-2).

<sup>40</sup> That view has been held in Hall, p. 103, n. 2; Rivier, *op. cit.*, n. 23, p. 15 above, vol. I, p. 58; Fauchille, *op. cit.*, n. 24, p. 15 above, t. I, pt. I, s. 199; Berdahl, *The Power of Recognition*, 14 A.J.I.L., 1920, p. 519.

<sup>41</sup> Above, pp. 15-6.

<sup>42</sup> Fauchille, *op. cit.*, t. I, pt. I, s. 206. Similarly, Rougier, *loc. cit.*, n. 33, p. 103 above, p. 232; Sir Robert Phillimore in *The Charkieh* (1873), L.R. 4 A. and E. 59, 86.

<sup>43</sup> Hershey, *Notes on the Recognition of De Facto Governments by European States*, 14 A.J.I.L., 1920, p. 499, at p. 516.

than *de jure* recognition, which is often used as an occasion for advertising the relations between the parties. It may be more fitting to a *de jure* recognition to be attended by a greater solemnity, but that does not explain the essential character of the two forms of recognition. Both *de jure* and *de facto* recognition may be either express or implied.<sup>44</sup> Thus, the appointment of diplomatic representatives is an implied mode of recognition; yet the recognition thus accomplished is usually *de jure*.<sup>45</sup> On the other hand, examples may also be found in which *de facto* recognition has been accorded by express acts, such as the recognition *de facto* by the United States of the Finnish Government on May 7, 1919, the Armenian Government on April 23, 1920, and the provisional government of Israel on May 14, 1948, by means of direct communications.<sup>46</sup>

The fact that *de facto* recognition is more often tacit should not be the reason for confusing it with *de facto* intercourse. Thus, in *The Annette, The Dora* (1919),<sup>47</sup> in spite of the co-operation in war and the exchange of representatives between Great Britain and the Provisional Government of Northern Russia, it was held that no recognition either *de jure* or *de facto* had been accorded. On the other hand, in *The Gagara* (1919)<sup>48</sup> the Estonian National Council was recognised by the British Government as 'a *de facto* independent body'. Was it a *de facto* recognition as 'the Government' of an Estonian State? The Court answered affirmatively.<sup>49</sup> Similar anomalous terms have been used with regard to Czechoslovakia and Poland during the First World War. The Czechoslovak National Council was recognised by France as 'the Supreme Organisation of the Czecho-Slovak Movement in Entente Countries', and by the United States as a '*de facto* belligerent government'.<sup>50</sup> The Polish Army was recognised by Great Britain, France and the United States as 'autonomous and co-belligerent under the supreme political

<sup>44</sup> Erich, *loc. cit.*, pp. 469-70, 481; Noël-Henry, *op. cit.*, s. 49; Lauterpacht, p. 346.

<sup>45</sup> See Resolution of the Institute of International Law, 1936, Articles 4, 9, 12, 14 (30 A.J.I.L., 1936, Supplement, p. 185). [Cf., however, Great Britain and Israel, 1949, for an instance in which it was clearly indicated that such exchange did not affect the *de facto* character of the recognition, above, p. 198.]

<sup>46</sup> Hackworth, vol. I, pp. 212, 222; State Dept., *Bulletin*, vol. 18, 1948, p. 673.

<sup>47</sup> [1919] P. 105.

<sup>48</sup> [1919] P. 95.

<sup>49</sup> At p. 103.

<sup>50</sup> Hackworth, vol. I, pp. 203, 204.

authority of the Polish National Committee'.<sup>51</sup> It may be doubted whether these acts of recognition constituted the recognition *de facto* of a State Government.<sup>52</sup>

As the borderline between *relations officieuses* and recognition (presumably *de jure*) has always been ill-defined,<sup>53</sup> it may be expected that just where *de facto* recognition fades into such *relations officieuses* would not admit of a clear definition. The Institute of International Law thinks that provisional agreements<sup>54</sup> and the maintenance of relations with the new government 'for the purposes of current affairs'<sup>55</sup> constitute recognition *de facto* of a new government. This is objected to by Professor Lauterpacht, who regards such acts as merely instances of *de facto* intercourse, which the practice of States considers as compatible with non-recognition, both *de jure* and *de facto*.<sup>56</sup> But any such generalisation may prove dangerous. The Soviet Government was recognised *de facto* by a number of States through the conclusion of provisional agreements.<sup>57</sup> It may perhaps be concluded that, although, in principle, recognition both *de jure* and *de facto* is distinguishable from *de facto* intercourse, any definitive line of demarcation must be regarded as still lacking.<sup>58</sup>

Fourthly, (the distinction between *de jure* and *de facto* recognition does not lie in the circumstance that the latter is conditional or provisional or with reservations attached. The view has been held by some authorities that *de facto* recognition is to hold the body recognised on probation on condition of good conduct, or the fulfilment of certain requirements, or the lapse of time.<sup>59</sup> Baty seems to think that this is the essence of *de facto* recognition, and he strongly disapproves of it.<sup>60</sup> The recognition by the

<sup>51</sup> Hackworth, vol. I, p. 216.

<sup>52</sup> See the doubt expressed in Lauterpacht, p. 334, n. 3.

<sup>53</sup> See above, pp. 219-20.

<sup>54</sup> Articles 9, 14 (2), Resolutions of 1936 (30 A.J.I.L., 1936, Supplement, pp. 186, 187).

<sup>55</sup> Article 14 (3) (*ibid.*, p. 187).

<sup>56</sup> Lauterpacht, pp. 346-7. See the same view of the Norwegian Foreign Office regarding consular agreements with the Franco administration in Spain (*Campuzano v. Spanish Government* (1938), Norway, Sup. Ct. (1938), *Annual Digest*, 1919-42 (Supplementary Volume), Case No. 43, at p. 70).

<sup>57</sup> Lauterpacht, p. 335.

<sup>58</sup> See Briggs, *loc. cit.*, n. 22, p. 216 above, p. 47.

<sup>59</sup> Noël-Henry, *op. cit.*, s. 151.

<sup>60</sup> See above, n. 17, p. 268 above, and *loc. cit.* at p. 487.

British Government of the Estonian National Council is thought to be an illustration of the conditional nature of *de facto* recognition.<sup>61</sup> Even if we assume for a moment that recognition may be conditional, subjection to conditions cannot be said to be the distinctive feature of *de facto* recognition alone. There are numerous cases in which 'conditions' have been attached to *de jure* recognition as well.<sup>62</sup>

There is, indeed, a practice among States to recognise new powers only *de facto*, and not *de jure*, until certain conditions have been satisfied. The significance of this practice depends upon whether '*de facto* recognition' is 'a recognition', that is to say, whether the granting of *de facto* recognition is conditioned upon the presence of the requirements of statehood or governmental capacity as laid down in international law. If *de facto* recognition is 'a recognition', then the recognition is definitive and cannot be withdrawn as long as the requirements continue to be met. The 'conditions' that may be required for *de jure* recognition are merely the price offered for a greater political solidarity. If *de facto* recognition is not 'a recognition', then it cannot be conditional, as there is nothing to be withdrawn. Professor Lauterpacht seems to want it both ways. He says:

'Recognition *de facto* takes place when, in the opinion of the recognising State, notwithstanding the presence of the principal condition of recognition, namely, that of effectiveness, there are absent other conditions of recognition which, in the opinion of the State in question, are required by international law. The result is—and this is the essential feature of *de facto* recognition—that for the time being recognition thus granted must be regarded as provisional and liable to withdrawal in case the prospect of those conditions being fulfilled should finally disappear.'<sup>63</sup>

It may be questioned whether these 'conditions' other than that of effectiveness are in fact requirements of international law. If they are, the logical conclusion would seem to be that in the absence of these conditions there could be no recognition whatever.<sup>64</sup> If they are not, then the new power should be

<sup>61</sup> *The Gagara* [1919] P. 95.

<sup>62</sup> *E.g.*, notes 9, 10, p. 266 above.

<sup>63</sup> Lauterpacht, p. 338.

<sup>64</sup> See Erich, *loc. cit.*, p. 481.

entitled to a full recognition, not one subject to conditions or revocation.

By saying that *de facto* recognition is provisional and transitory, nothing more is meant than that it is revocable at a not-too-distant date. As we have pointed out, (recognition, whether *de facto* or *de jure*, as evidence of the existence of the body recognised, is incapable of being withdrawn, while as a manifestation of friendly relations it is revocable at will in both cases.<sup>65</sup> Therefore, it cannot be said that the shortness of duration is the peculiar characteristic of *de facto* recognition.) The Institute of International Law, in stating that *de facto* recognition may be accorded by means of the conclusion of provisional agreements,<sup>66</sup> may seem to support the contrary view. It is believed, however, that the Institute was merely pointing out the difference in the methods by which recognition can be accorded, rather than the difference in the nature of the two forms of recognition. Entering into provisional agreements may be an indication of lack of confidence; but the lack of confidence need not be a sign that the existence of the power recognised is incomplete or ephemeral. The expectancy of stability and permanence of a State or government is necessarily a matter of degree and speculation. New States or governments are indeed more likely to be shrouded in uncertainties. But a recognising State need not go into such speculations.<sup>67</sup> A power recognised *de jure* may be just as likely to be short-lived.<sup>68</sup> What is important for the recognising State is to be assured that the power recognised does, in fact, have existence at the time of the recognition. Proof of stability is often a matter of speculation. Great Britain waited three years before recognising *de jure* the Soviet Government, while the United States recognised *de jure* the Republic of Panama one week after the recognition *de facto*.<sup>69</sup> It is usual for *de jure* recognition to be accorded directly without the intermediate stage

<sup>65</sup> Above, p. 261.

<sup>66</sup> Articles 9, 14 (2), Resolutions of 1936 (*loc. cit.*, n. 54 above, pp. 186, 187).

<sup>67</sup> McNair (*op. cit.*, pp. 353-4) and Erich (*loc. cit.*, p. 482) think that in unstable situations *de facto* recognition may be preferred, but they base this preference upon pure 'prudence and caution' and opportunism. In other words, they consider the difference as entirely political.

<sup>68</sup> Georgia was recognised *de jure* by the Great Powers in 1920 (Erich, *loc. cit.*, p. 483). By the end of 1922 she was merged into the Soviet Union (164 *Annual Register* 1922, p. 188).

<sup>69</sup> Moore, *Digest*, vol. 3, p. 55.

of *de facto* recognition.<sup>70</sup> If the stability of the new régime is really in doubt, even a *de facto* recognition would not be justifiable.

Finally, (the distinction between *de facto* and *de jure* recognition does not lie in the circumstances under which one or the other should be accorded, nor in the legal effects of the recognition.) Professor Lauterpacht suggests that *de facto* and *de jure* recognition are distinct legal acts justified under different circumstances and producing distinct legal consequences.<sup>71</sup> We have already discussed the untenability of his suggestion that the sole condition of effectiveness is sufficient to justify recognition *de facto*, while other requirements are necessary for recognition *de jure*. We have pointed out that, if these 'other requirements' are legal requirements, then *de facto* recognition is not 'a recognition'.<sup>72</sup> We are inclined to think that these 'other requirements' are not legal requirements. (The effectiveness of control (implying, of course, the absence of precariousness) alone qualifies a new power to recognition both *de facto* and *de jure*.<sup>73</sup> But other factors may influence the recognising State in deciding upon the nature and scope of the relations it may wish to enter into with the new body. An unfavourable decision may perhaps result in a mere *de facto* recognition. The difference is therefore purely political, not legal.)

(As to legal consequences, as even acts of totally unrecognised actual governments have been given legal effects in municipal and international law,<sup>74</sup> such legal effects should, *a fortiori*, be given to one recognised *de facto*. (In matters regarding jurisdictional immunity,<sup>75</sup> validity of internal acts,<sup>76</sup> and retroactivity<sup>77</sup> English

<sup>70</sup> [At the present day this does not seem to be borne out in Anglo-American practice, see the case of Israel, pp. 101-2, 123 above. *Cx.*, however, the recognition of Viet Nam, Laos and Cambodia as associate States within the French Union, *The Times*, February 8, 1950, United States Information Service, *Daily Wireless Bulletin*, No. 1200, February 8, 1950.]

<sup>71</sup> Lauterpacht, pp. 338-46.

<sup>72</sup> Above, p. 281.

<sup>73</sup> Noël-Henry, *op. cit.*, s. 170; also above, pp. 54 *et seq.*, 117 *et seq.*

<sup>74</sup> See above, Part 3.

<sup>75</sup> *The Gagara* [1919] P. 95.

<sup>76</sup> *Luther v. Sagor* [1921] 3 K.B. 532. Article 15 of Resolution of the Institute of International Law, 1936, seems to imply that the internal acts of a government recognised only *de facto* cannot be recognised. But Article 17 clearly provides that extra-territorial effects may even be accorded to acts of totally unrecognised governments. No distinction is, however, made between the *de jure* and *de facto* recognition of States (30 A.J.I.L., 1936, Supp., pp. 186-7). The view of the inferiority of the effect of *de facto*

courts have positively committed themselves to the view that no distinction need be drawn between *de jure* and *de facto* recognition.) In the cases regarding the Italian authority in Ethiopia and the Nationalist administration in Spain, these principles have even been extended to a situation in which the authority in question had not completely consolidated itself as 'the government' of a State.<sup>78</sup> It is also quite clear that in matters concerning the acquisition of a new nationality<sup>79</sup> and the binding force of international engagements there is no distinction between *de jure* and *de facto* recognition.<sup>80</sup> As to whether in other matters the distinction is material, the question has not been decided one way or the other by English courts.<sup>81</sup> English courts have throughout been guarded in their pronouncements, and have confined themselves to the particular point at issue.<sup>82</sup> It may therefore be a

recognition is rejected by Noël-Henry (*op. cit.*, s. 151). In *Tallinna Laevauhisus Ltd. v. Nationalised Tallinna Laevauhisus and Estonia State Shipping Line* (1946), 79 Lloyd's List L.R. 245, it was, however, held that the law of the Estonian Soviet Socialist Republic could not be recognised because the government was only recognised *de facto*. This view is criticised in 19 B.Y.I.L., 1938, p. 238, n. 1; 23 *ibid.*, 1946, p. 386. [In the Court of Appeal it was pointed out that the reason for the non-recognition of the Estonian law lay in the fact that this law had not been proved as must any foreign law, regardless of the *de facto* character of the recognition (1946) 80 Lloyd's List L.R. 99.]

<sup>77</sup> *Luther v. Sagor* [1921] 3 K.B. 532, 543, 551. In *Oetjen v. Central Leather Co.* (1917) 246 U.S. 302, the principle of retroactivity was mentioned with reference to *de jure* recognition. The omission of any reference to *de facto* recognition is probably unintentional (Lauterpacht, p. 342, n. 3). In *Haile Selassie v. Cable and Wireless Ltd.* (No. 2) [1939] 1 Ch. 182, 197 it was held by Sir Wilfrid Greene, M.R., that, since the recognition of the King of Italy by Great Britain as the *de jure* Emperor of Ethiopia, his right of succession to Ethiopian property abroad was to be dated back 'at any rate to the date when the *de facto* recognition, recognition of the King of Italy as the *de facto* sovereign of Abyssinia, took place'. This seems to imply that the principle of retroactivity with regard to the right of succession does not go beyond the date of the *de facto* recognition. On the other hand, in *Princess Paley Olga v. Weisz*, the court regarded the *de facto* recognition of the Soviet Government by Britain in 1921 as dating back to '1918—or the end of 1917' ((1929) 45 T.L.R. 365, 366).

<sup>78</sup> See below, p. 293 *et seq.*

<sup>79</sup> Noël-Henry, *op. cit.*, s. 51.

<sup>80</sup> See Hervey, *op. cit.*, p. 14. This is obvious, since so many *de facto* recognitions have been accorded by means of international agreements.

<sup>81</sup> Brierly, *op. cit.*, p. 134.

<sup>82</sup> 'For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign State of the one form of government or of the other, but for the present purpose in my opinion no distinction can be drawn' (Banks L.J. in *Luther v. Sagor* [1921] 3 K.B. 532, 543). Also Warrington L.J., *ibid.*, 551; Lord Atkin in *The Arantzazu Mendi* [1939] A.C. 256, 265. Goddard L.J. in his concurring opinion in the Court of Appeal in the latter case, however, remarked: '... we are bound by authority to hold that for all purposes the consequences are the same as they would be if the government were a *de jure* government' ([1939] P. 37, 55. Italics added.).

matter of opinion whether the lack of legal distinction is true for all purposes.<sup>83</sup>

(Professor Lauterpacht, who thinks that for some purposes there are legal distinctions between the two forms of recognition, draws attention especially to two 'legal' consequences of *de jure* recognition, which are said to be absent in *de facto* recognition, namely, the full diplomatic intercourse between the parties and the right 'to represent the State in matters of State succession and otherwise'.<sup>84</sup>) In another place he points out the importance which States attach to the different forms of recognition, as exemplified in the Danish-Russian Preliminary Agreement of April 23, 1923. It was provided in that agreement that Denmark should not be entitled to claim the special privileges granted by Russia to States which had recognised or may have recognised her *de jure*,<sup>85</sup> [unless Denmark accorded to Russia such compensation as was accorded by the State in question].

Regarding the first point, it may be said that the appointment and the reception of diplomatic representatives is one of the commonest modes of recognition. It cannot be said to be the legal consequence of recognition. States recognising each other may yet maintain no diplomatic relations. In *Fenton Textile Association, Ltd. v. Krassin* (1922) it is true that the Foreign Office stated that 'It is not the practice of the Sovereign to receive the representative of States which have not been recognised *de jure*'.<sup>86</sup> All the three Lords Justices of the Court of Appeal (Bankes, Scrutton, Atkin) made no reference to this point, however, but gave judgment mainly upon the ground that the position of Krassin as 'the official agent of the Soviet Government' under the Trade Agreement did not entitle him, as such, to full diplomatic immunity. The British Government had clearly stated in the House of Commons that Krassin was not received as a diplomatic representative.<sup>87</sup> His immunity was defined in Articles IV and V of the Trade Agree-

<sup>83</sup> Lauterpacht argues that for some purposes the legal consequences of *de jure* and *de facto* recognition may not be the same (p. 288, n. 2). *Contra*, Brierly, *op. cit.*, p. 134; Briggs, n. 1 above, pp. 690-1.

<sup>84</sup> Lauterpacht, pp. 345-6. A third consequence, the non-liability to withdrawal, has already been dealt with (pp. 261-2 above).

<sup>85</sup> Lauterpacht, p. 335. The text of the Agreement is printed in XVIII L.N.T.S. 15.

<sup>86</sup> (1922) 37 T.L.R. 259, 260. [But see the relations between Great Britain and Israel, 1949, above, p. 198, below, p. 286.]

<sup>87</sup> March 21, 1921, Parl. Deb., H.C., 5th ser., vol. 139, col. 2198.



ment.<sup>88</sup> It was the position and function of Krassin, rather than the lack of *de jure* recognition of his government, which determined, in this case, the scope of his immunity. It was observed by Atkin L.J. that, even if Krassin were entitled to ordinary diplomatic privileges, it would still be open to the respective governments to enlarge or restrict them by agreement.<sup>89</sup> The case clearly shows that the Court did not think that the absence of *de jure* recognition was relevant in determining the question of diplomatic immunity.<sup>90</sup>

It may also be pointed out that the Foreign Office statement regarding the British practice of not receiving diplomatic representatives of foreign governments not recognised *de jure* has not been uniformly observed. The representative of the French Provisional Government was accorded diplomatic privileges in Britain.<sup>91</sup> [Similarly, in 1949 the status of the Israeli representative in Great Britain was raised to that of a 'duly accredited Minister' and his office to that of a 'Legation', and his letters of credence were presented to the King, but it was not considered that this accorded *de jure* recognition to Israel.]<sup>92</sup> The practice was not adopted in the United States. In recognising *de facto* the Carranza Government in Mexico in 1915, the United States intimated her willingness to resume formal diplomatic relations, which took place in March, 1917,<sup>93</sup> some months before the *de jure* recognition.<sup>94</sup> In an instruction to the American chargé d'affaires in Mexico, May 25, 1920, the State Department cautioned that the chargé should not permit 'any imputation that the present régime (of de la Huerta) has been *even de facto* recognised by the Government of the United States. Recognition cannot be accomplished by inference merely, but by the *full and formal entrance into international relations* through the public action of the respective executives of the two countries'.<sup>95</sup> On May 3, 1919, the Council of Ministers of Foreign Affairs composed of representatives of the Great Powers agreed that diplo-

<sup>88</sup> Agreement of March 16, 1921 (114 B.F.S.P., 1921, p. 373, at p. 376).

<sup>89</sup> (1922) 38 T.L.R. 262.

<sup>90</sup> For the contrary view, see Lauterpacht, p. 344; Noël-Henry, *op. cit.*, s. 151.

<sup>91</sup> See Mr. Law's statement in the House of Commons, October 25, 1944 (Parl. Deb., H.C., 5th ser., vol. 404, col. 143).

<sup>92</sup> [The Times, May 14, 1949, and above, p. 198.]

<sup>93</sup> Hackworth, vol. I, p. 260.

<sup>94</sup> On August 31, 1917 (*Oetjen v. Central Leather Co.* (1917), 246 U.S. 297, 301).

<sup>95</sup> Hackworth, vol. I, p. 261. Italics added.

matic representatives would be appointed to Finland after the recognition *de facto* of the Finnish Government. On May 7, 1919, the United States recognised *de facto* the Finnish Government. On August 21, 1919, the Finnish Minister was received by the President of the United States. Upon the request of the Finnish Minister to acknowledge the previous recognition as being not only *de facto*, but also *de jure*, the United States, in reply, stated that this reply was held 'to constitute full recognition of Finland as from May 7, 1919'.<sup>96</sup> In the Provisional Agreement of July, 1920, in which Germany recognised *de facto* the independence of Latvia, it was provided in Article 1 that diplomatic representatives of the two countries should be dispatched immediately.<sup>97</sup> In view of the examples cited above, it is difficult to say that diplomatic relations are possible only between governments recognising each other *de jure*.

As to the second point, the argument relied chiefly upon the case of *Haile Selassie v. Cable and Wireless, Ltd. (No. 2) (1939)*.<sup>98</sup> In this case, both the *de facto* and the *de jure* governments were in existence and recognised by the British Government. In the international law sense, only the *de jure* government was the government of Ethiopia, and the Italian Government should be regarded as nothing but a military occupant. As long as the Emperor Haile Selassie remained the *de jure* government, his right to the property could not be divested and the question of succession did not arise. That question only arose when, by the *de jure* recognition of the King of Italy as Emperor of Ethiopia, the former government of Haile Selassie became extinct in the eyes of Great Britain. It was not the character of the recognition, but the fact that there was any occasion for succession at all which determined the right of succession. That the determination of the question of succession upon the distinction between *de jure* and *de facto* recognition is unhelpful may be illustrated by the proposition of the Soviet delegate to the Genoa Conference of 1922 that the Soviet Government could not be held liable for debts of its predecessors, until it had been recognised *de jure*.<sup>99</sup>

<sup>96</sup> Hackworth, vol. I, pp. 212-3.

<sup>97</sup> See above, p. 267, n. 15.

<sup>98</sup> [1939] Ch. 182. See Lauterpacht, p. 343.

<sup>99</sup> Papers relating to International Economic Conference, Genoa, April-May, 1922, Cmd. 1667 (1922), p. 43. See also Wilson, *Diplomatic Relations and the U.S.S.R.*, 28 A.J.I.L., 1934, p. 98, at p. 99.

Such a proposition undermines the more fundamental principle that the State remains unchanged in spite of the change of its government. It is not believed that it was accepted by other powers. If the succession to liabilities is the same in *de facto* as in *de jure* recognition, then it would be difficult to argue that a difference exists in regard to the succession to rights.

As regards the question of the Danish-Soviet Agreement, it is not easy to see how a case can be made to show that the discrepancy in commercial treatment is attributable to the form of recognition. A State is certainly free to show more favours to countries in more friendly relations with it, [although, as we have seen, in this case, Denmark could obtain such additional favours by according to Russia 'compensation similar to that accorded by the country in question']. The *de jure* recognition by Denmark on June 18, 1924, did not, after all, succeed in securing from the Soviet Government the treatment from which she thought herself to have been debarred for the reason that her recognition was insufficient. The designation by the Soviet Government of February 15, 1924, as the date before which recognition *de jure* would entitle the recognising State to favoured treatment was purely arbitrary.<sup>1</sup> It cannot, therefore, be considered as having thrown any light on the legal consequences of *de jure* as contrasted with *de facto* recognition.<sup>2</sup>

Having dismissed as irrelevant the so-called 'legal' distinctions between *de jure* and *de facto* recognition, we are forced to the unavoidable conclusion that the distinction is primarily political.<sup>3</sup> Since recognition indicates the state of political relations between the parties, and since political relations admit of degrees and variations, recognition, as a reflection of such political relations, must consequently be divisible into grades. Normally, recognition should be full and complete, *i.e.*, *de jure*; *de facto* recognition must be considered as an exception, and as a modification of the normal relations existing between States.<sup>4</sup>

<sup>1</sup> See Taracouzio, *The Soviet Union and International Law*, 1935, pp. 260-1.

<sup>2</sup> See Lauterpacht, p. 335, n. 3.

<sup>3</sup> *Accord*, Rougier, *loc. cit.*, p. 232; Fauchille, *op. cit.*, t. I, pt. I, s. 199; Briggs, *loc. cit.*, pp. 690-1; McNair, *op. cit.*, p. 353.

<sup>4</sup> Erich, *loc. cit.*, p. 481. Similarly, Noël-Henry, *op. cit.*, s. 151. Williams seems, however, to be of the opinion that *de facto* recognition is the normal form of recognition (*loc. cit.*, n. 90, p. 52 above, p. 781). But this is the result of his identifying *de jure* recognition with the recognition of the constitutional legality of the new régime. Baty (*loc. cit.*, n. 49, p. 66 above, p. 487) categori-

*De jure* recognition marks a measure of subjective approval of the coming into being of the new entity; on the other hand, *de facto* recognition betrays no sign of enthusiasm, but is the minimum recognition consistent with the fact of existence.<sup>5</sup> It is more than *de facto* intercourse, because the latter may take place with a body which is not sovereign, such as an insurgent or belligerent community or a military occupant. It is true that the legal effects of existence require no recognition; but recognition, even *de facto*, would be useful evidence of such an existence. *De jure* recognition signifies that not only is such an existence acknowledged, but also that it is indisputable and that the establishment of political relations with it is desired.

It may be seen, therefore, that the political distinction between the two forms of recognition is both real and important. In *de facto* recognition there is naturally lacking the same intimacy of relations as exists between States recognising each other *de jure*. Although *de facto* recognition may be sufficient evidence of the actual existence of a new State or government, it may not be a sufficient indication of the intention of the recognising State to treat it in the fullness of international relations.<sup>6</sup> It is a political expedient which assigns a new power to a 'half-baked' status with undefined relations with other States, and subjects it to indignities and inconveniences which it may justly resent. The practice is especially deplorable as it has often been used as a means of political bargaining.<sup>7</sup>

If *de facto* recognition indicates a measure of disapproval of a new régime consistent with the acknowledgment of its actual existence, is it compatible with the obligation of non-recognition? To answer this question two kinds of obligations of non-recognition

cally denies that there should be such a thing as a '*de facto* recognition'. This is the result of his identifying *de facto* recognition with conditional recognition and his denial that recognition as the mental appreciation of facts can be conditional. See above, p. 268, n. 17.

<sup>5</sup> Such as the United States' recognition of the *Anschluss*. See Lemkin, *Axis Rule In Occupied Europe*, 1944, pp. 114-5; Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 A.J.I.L., 1938, p. 421.

<sup>6</sup> In the British Foreign Office instruction, 1822, it was pointed out that the distinction between *de jure* and *de facto* recognition is one which is concerned 'rather as to the Mode of our Relations, than as to whether they shall or shall not subsist, to the extent, in the matter of Rights, as regulated by the Law of Nations' (Smith, vol. I, p. 125; p. 80 above). Recognition *de facto* might, for instance, have been an insufficient qualification for the admission to the League of Nations (Laeserson, *loc. cit.*, n. 28, p. 60 above, p. 243).

<sup>7</sup> Baty, *op. cit.*, n. 21, p. 15 above, pp. 210-2.

tion must be distinguished: a general international law obligation not to recognise a régime before it has acquired the necessary requisites of statehood or governmental capacity; and an obligation under international agreements not to show approval or friendliness to a new régime by way of recognition. As *de facto* recognition is no indication of approval—rather, it is an indication of disapproval—it is not incompatible with the obligation of non-recognition of the second kind.<sup>8</sup> On the other hand, as recognition, even *de facto*, is evidence of the existence of a State or government, to recognise *de facto* prematurely a régime which has not assembled the necessary requisites of statehood or governmental capacity would be contrary to international law.<sup>9</sup> In adopting a report with regard to the Sino-Japanese dispute on February 24, 1933, the Members of the League of Nations declared that they would not recognise the régime in Manchuria ‘either *de jure* or *de facto*’.<sup>10</sup> This was necessary because the régime in question never amounted to anything more than a military occupation by Japan. Professor Erich suggests that a State may recognise *de facto* a new power whose qualifications as a State may be doubtful, but to which the recognising State wishes to extend its moral and political support.<sup>11</sup> Though such a recognition has often been given, there is no doubt that it constitutes an intervention in the internal affairs of other States and is unjustifiable in international law.

#### § 4. *De Jure* GOVERNMENT AND *De Facto* GOVERNMENT

(Unlike the distinction between *de jure* and *de facto* recognition, which is mainly political, the distinction between *de jure* and *de facto* governments is essentially legal.) By ‘*de jure* government’ we mean a government *de jure* in the international law sense, that is, a government exercising unrivalled control over the whole of the territory of a State, though, subsequent to the

<sup>8</sup> Lauterpacht, p. 348. [In so far as at the present time even *de facto* recognition is regarded by the recognised State or Government as something to be sought after from the point of view of prestige, it may well be contended that even this is incompatible with the second kind of obligation of non-recognition.]

<sup>9</sup> *Contra*, Phillimore (*op. cit.*, n. 21, p. 15 above, vol. 2, p. 23) thinks that *de facto* recognition is no offence to the parent State because ‘it decides nothing concerning the asserted rights of the latter’.

<sup>10</sup> Hackworth, vol. I, p. 336.

<sup>11</sup> Erich, *loc. cit.*, p. 482.

establishment of such control, its authority may at times have been challenged.<sup>12</sup> Such a challenge may come either from a belligerent community in a civil war or a foreign military occupant in an international war.<sup>13</sup> As long as the war lasts the government which has hitherto been governing continues to be regarded internationally as the *de jure* government of the State, to whatever extent it may have lost actual control. The *de facto* government, although wielding actual power in the territory under its control, may not, according to the traditional view, be regarded as the sovereign of the territory.<sup>14</sup> This is true even if the *de jure* government has been completely ousted,<sup>15</sup> or, indeed, has disappeared.<sup>16</sup>

<sup>12</sup> See above, p. 271. It is true, as Austin argues, that a *de jure* government without *de facto* control is not a government (Austin, *Lectures on Jurisprudence*, 1869, vol. I, p. 336), but a government once having secured *de facto* control continues to be the government until definitely deprived of that control.

<sup>13</sup> Under exceptional circumstances foreign occupation may take place in the absence of war, e.g., the French occupation of the Ruhr in 1923, the United States occupation of Cuba in 1906, and the Dominican Republic in 1917 (Hackworth, vol. I, s. 29); the Allied occupation of the Rhineland (Fraenkel, *Military Occupation and the Rule of Law*, 1944, Peace Period, 1920-3, Part 2). For other instances of pacific occupation, see Wheeler, *Governments De Facto*, 5 A.J.I.L., 1911, p. 66, at pp. 80-3. For judicial authority, see *Keene v. McDonough* (1834) 8 Pet. 308. As to the powers of pacific occupants, see Cavaré, *Quelques Notions Générales sur l'Occupation Pacifique*, 31 R.G.D.I.P., 1924, p. 339.

<sup>14</sup> See Oppenheim, vol. 2, s. 169; Baty, *op. cit.*, pp. 229-30, 469 *et seq.*; same, *loc. cit.*, n. 13, p. 100 above, p. 446; Garner, *International Law and the World War*, 1920, vol. 2, p. 77; *Resolutions of the London Conference of International Law of 1943*, 38 A.J.I.L., 1944, pp. 291-2; Finch, Foreword to Lemkin, *op. cit.*, p. vii; Briggs, *loc. cit.*, p. 698. As to practice of States, see the instruction of the United States Department to the American Ambassador in France, which, referring to the French occupation of the Ruhr, said: 'Sovereignty over foreign territory is not transferred by such occupation . . .' (Hackworth, vol. I, p. 146). The United States declared the continued maintenance of the local laws when she was in occupation of the Philippines (*ibid.*, pp. 144-5, 156). A Belgian court held that the Belgian law of treason was applicable to a Belgian subject for acts committed in the territory under enemy occupation (*Kauhlen Case* (1920), *Annual Digest*, 1919-22, Case No. 323). The Legal Adviser of the State Department, however, stated on May 7, 1936, that a military occupant 'to all intents and purposes, is the sovereign during the period of occupation' (Hackworth, vol. I, p. 156). See similar view of an Italian court in *Del Vecchio v. Connio* (1920), *Annual Digest*, 1919-1922, Case No. 320.

<sup>15</sup> Above, pp. 63-4.

<sup>16</sup> Hall (p. 582) is of opinion that in the event of the conquest of one State by a State which is at the same time at war with another, the conquest cannot be considered complete if by any reasonable chance the other war might extend to the conquered territory. Baty thinks this will not apply to cases where the war is prolonged for many years (Baty, *op. cit.*, p. 482). Hall's view seems to have been acted upon during the late war (Oppenheimer, *Governments and Authorities in Exile*, 36 A.J.I.L., 1942, p. 568; Brown, *Sovereignty in Exile*, 35 A.J.I.L., 1941, p. 666).

During World War II, Czechoslovakia and Albania (above, p. 66: also Lemkin, *op. cit.*, pp. 106-7) were for a time without a government. There

The principles regarding foreign military occupation have been clearly laid down in Hague Convention No. IV of 1907 (Articles 42-56). Within the limits prescribed by international law, the military occupant exercises the powers of administration, and acts in excess of such limits are internationally invalid.<sup>17</sup> The traditional view regarding the powers of a belligerent community in civil war is similarly to restrict its legal acts to those immediately connected with the prosecution of the war.<sup>18</sup> But a belligerent community, having no other existence apart from that of a fighting body, must needs have the power to administer the territory under its control, if solely for the purpose of carrying on the war. This necessity logically follows from the acceptance of the proposition that a revolutionary body must be allowed to fight its war in a legal manner. For this reason, considerable

was strictly no legal continuity between the Government of Czechoslovakia and the Czechoslovak National Council under Dr. Benes. There were doubts whether the exiled Belgian Government could continue to be the same Government without the King. See below, p. 297, n. 39.

<sup>17</sup> Hall, pp. 579-80. Annexation *durante bello* is illegal and does not confer title (Oppenheim, vol. I, s. 239; Langer, *op. cit.*, n. 28, p. 60 above, pp. 17, 106, 117; see also Bentivoglio, *La 'Debellatio' nel Diritto Internazionale*, 1948, pp. 39-45). The Allied Powers denied the right of Germany and Austria to dispose, in 1918, of the Polish territory under their occupation (Hackworth, vol. I, p. 146). The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties included in its list of 'war crimes' the 'Usurpation of sovereignty during military occupation' (14 A.J.I.L., 1920, p. 114). In 1921, the United States refused to recognise the right of Greece to levy extra taxes in the occupied Turkish territory (Hackworth, vol. I, p. 159). Acts of the German occupation authorities during World War I in excess of lawful limits have been criticised by Garner (*International Law and the World War*, 1920, ss. 362, 365, 371, 372, 376). By a declaration of January 5, 1943, the Allied Powers declared invalid all transfers of property which the enemy had effected in the occupied territories through illegal methods (Langer, *op. cit.*, p. 109). For the application of this principle in national courts, see *Annual Digest*, 1919-22, *Auditeur Militaire v. Van Dieren* (1919); *De Nimal v. De Nimal* (1919); *Naoum v. Govt. of Colony of French West Africa* (1919); *Commune of Bácsborod Case* (1922); *Czechoslovak Occupation (Hungary) Case* (1922); *Boliotti v. Masse* (1920); *Del Vecchio v. Connio* (1920); *Poland v. Ralski* (1922); *Bochart v. Committee of Supplies of Corneux* (1920); *Mathot v. Longué* (1921); *Postula v. City of Liège* (1919); Cases No. 310-2, 316-8, 320, 322, 327, 329, p. 460, n. (respectively); *Poland v. Siehen* (1926), *ibid*, 1925-1926, Case No. 10. See also, below, n. 30. For a review of cases regarding the military occupation of Poland in World War I, see Rankin, *Legal Problems of Poland After 1918*, 26 *Grotius Transactions*, 1940, p. 1, at pp. 21-3. For a collection of German legislation in occupied Belgium during World War I, see Huberich and Nicol-Speyer (ed.), *German Legislation for the Occupied Territories of Belgium*, 1915-1919. For a collection of laws of Axis Occupants in Europe during World War II, see Lemkin, *op. cit.*, *passim*, esp. pp. 12-4. As to the illegal acts of the enemy in the matters of the administration of justice, see Freeman, *War Crimes by Enemy Nationals Administering Justice in Occupied Territories*, 41 A.J.I.L., 1947, p. 579. See generally, on this subject, McNair, *op. cit.*, pp. 319-22; Borchard, *Diplomatic Protection of Citizens Abroad*, 1928, pp. 207-9.

<sup>18</sup> Below, p. 306. Borchard equates the powers of a belligerent community with a military occupant (*op. cit.*, p. 207).

concessions have been made towards treating a belligerent community as a *de facto* governing body in its territory.<sup>19</sup>

A marked development in this direction is discernible in the events of the past dozen years. Belligerent occupants both in international and civil wars have been permitted to exercise greater powers than they did formerly in matters arising within the territory under their control. At least in England, courts have begun to recognise an intermediate situation between a military occupant and the government of a State, where a military occupant had been 'recognised as a *de facto* government' by the British Government. Thus, it has been held that a bank incorporated by the law of the *de jure* government should be governed by the laws of the *de facto* government then in occupation of its corporate home;<sup>20</sup> that the laws and acts of such a *de facto* government could not be impugned and are to be treated as valid to the exclusion of the laws and acts of the *de jure* government claiming jurisdiction over the same area,<sup>21</sup> and that such a *de facto* government is entitled to sovereign immunity in English courts.<sup>22</sup> English judges have been outspoken in identifying such a *de facto* government with the government of a sovereign State.<sup>23</sup>

Very similar results have been reached in a Dutch case, *The Sendeja* (1937).<sup>24</sup> In two recent American cases<sup>25</sup> the principle

<sup>19</sup> Below, part 6, ch. 20.

<sup>20</sup> *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. 513; *Banco de Bilbao v. Sancha: same v. Rey* [1938] 2 K.B. 176; see below, pp. 318-20.

<sup>21</sup> *Banco de Bilbao v. Sancha: same v. Rey* [1938] 2 K.B. 196; below, p. 319.

<sup>22</sup> *The Arantzazu Mendi* [1939] A.C. 256; below, p. 320.

<sup>23</sup> See the judicial opinions expressed in *The Arantzazu Mendi*, p. 284 above, n. 82, p. 320 *et seq.*, below.

<sup>24</sup> Below, p. 320. The point was precluded from being raised in *The Cristina* [1938] A.C. 485, because it was overshadowed by the issue of sovereign immunity (B.Y. XIX (1938), 244). The same is true of *The Arantzazu Mendi*. But Lord Atkin found occasion to state, in an *obiter dictum*, that the authority in control of the place of ship's register is the sovereign in that territory and has the right to make legislative decrees affecting the ship ([1939] A.C. 265). See contrary judgment of the Court of Appeal of Bordeaux in *Lafuente v. Llaguno Y. Duranona*, 1938, recognising the validity of the decree of the Spanish Republican Government requisitioning ships registered at Bilbao, which was occupied by the enemy (*Annual Digest*, 1938-1940, Case No. 55). See Baty, 'De Facto' States: Sovereign Immunities, 45 A.J.I.L., 1951, p. 166.

<sup>25</sup> *Amstelbank, N.V. v. Guaranty Trust Co. of N.Y.* (1941), 31 N.Y.S. 2d 194, *Annual Digest*, 1941-1942, Case No. 171; *Koninklijke Lederfabriek 'Oisterwijk' N.V. v. Chase National Bank of the City of N.Y.* (1941), 30 N.Y.S. 2d 518, 32 N.Y.S. 2d 131, *ibid.*, Case No. 172. By the time the second case came before the Supreme Court of New York, Appeal Division, the United States had entered the war, but the judgment was nevertheless rendered on practically the same ground as in the first case.



of the English courts seems to have been applied in a converse sense. It was held by a New York court that German decrees promulgated in the Netherlands should not be given force and effect because the United States 'has refused to recognise' the German military occupation of Holland. 'Any decrees by this unrecognised occupying force would not have "the force and effect of mandates of a lawful sovereign".'<sup>26</sup> Does this mean that if the United States had 'recognised' the occupation the German decree would have been regarded as 'mandates of a lawful sovereign'? It is submitted that the validity of the German decree should depend upon whether it was within the proper limits of the authority of a military occupant. The court, however, accepted the test of recognition.

The new tendency seems to allow greater scope to military occupants than that provided by traditional international law. The Allied occupation of the Axis countries at the end of the late war provides examples for an even further departure from the traditional doctrine.<sup>27</sup> It may be debatable whether these acts of occupying Powers in excess of the traditional rules are *ultra vires*, or whether the rules themselves have been undergoing transformation.

It has been argued that, in view of the social and economic changes since the Hague Conferences, the Hague Convention, in treating the civilian population as bystanders in war, has become archaic.<sup>28</sup> At least, it has been suggested, a broadened interpretation should be given to the established rules, in order to give effect to the change of circumstances. For example, the military occupant might be allowed, as such, to control the operation of the important banks in its territory, without the necessity of being regarded as the sovereign of the territory.<sup>29</sup> But how far the existence of the new state of affairs justifies the modification of the Hague principles or the liberalisation of their interpretation cannot be said to have been well settled. (It is a matter of grave doubt whether, in view of the doctrines adopted in the Ethiopian

<sup>26</sup> *Amstelbank Case*, *ibid.*, p. 587.

<sup>27</sup> See above, p. 70 *et seq.*

<sup>28</sup> See note in 21 B.Y.I.L., 1944, p. 151; see also Smith, *The Crisis in the Law of Nations*, 1947, chapter 5. Rennell, *op. cit.*, n. 22, p. 264 above, pp. 344, 419.

<sup>29</sup> 19 B.Y.I.L., 1938, p. 239; and see Rennell, *op. cit.*, p. 344.

and Spanish cases, the English or any other Allied courts would be prepared to accord the same measure of legality to acts of the enemy occupants during the late war,<sup>30</sup> as they did to acts of the Italian and Spanish Nationalist Governments in the earlier cases.)

(It is therefore a question whether it is sound international legislative policy to adopt the English doctrine or how far it can be adopted. *De facto* control is, no doubt, essential for determining the international validity of governmental acts; but, until the war is over, it cannot be said that the *de facto* authority is firmly established.<sup>31</sup>) In *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937), Clauson J. was unimpressed by the contention that the Italian Government was a mere military occupant, and dismissed it on the ground that there was no other effective government in the same area.<sup>32</sup> Every military occupant must, by definition, be the sole authority within a particular area. Only by holding it against all reasonable recapture can it become the government of territory. (The blurring of the distinction by

<sup>30</sup> See McNair, *op. cit.*, p. 341; Freeman, *loc. cit.*, p. 579; Lemkin, *passim*, esp. pp. 12-4, 26-31.

The attitude of the courts of the occupied States seemed to vary. Some upheld the traditional view, as in *Huby Frères of Echternach v. Racké* (1941), where a Dutch court held that the 'annexation' of Luxembourg by Germany could not change the treaty rights of Luxembourg nationals in Holland (*Annual Digest*, 1919-1942 (Special Supplement), Case No. 123). The Greek Council of State held that military occupation imported no derogation from the sovereignty of the occupied State, though it considered that a 'government' set up by the enemy occupant had power to issue laws in contravention to the established legal order (*Marika Eliadi Maternity Home Case* (1942), *ibid.*, Case No. 152; *In re G.D.* (1942), *ibid.*, Case No. 153). The French courts, however, acted upon the theory that there was a co-existence of double sovereignty in the occupied territory (*Re Krebs* (1942), *ibid.*, Case No. 156, at p. 282). The Tribunal Civil de la Seine upheld an anti-Jewish decree issued by the German military authorities (*Re C. 1941*, *ibid.*, Case No. 157). In two other cases, the acts of German authorities were upheld as in accordance with the Hague Convention (*Re L. and D.* (1941), *ibid.*, Case No. 158; *Privat v. Bertaux* (1941), *ibid.*, Case No. 159). It must be noted that the courts mentioned above were then functioning in the territories under enemy occupation. In Norway, the German authorities declared the King of Norway deposed, set up a puppet government, altered political laws and interfered with the functioning of the courts (*Public Prosecutor v. X* (1940), *ibid.*, Case No. 160, at pp. 286-7). Most of the governments of the liberated countries have enacted legislation nullifying acts of the enemy occupant in excess of the Hague Convention: Poland (Lachs, *Polish Legislation in Exile*, 24 J.C.L., 1942, p. 57 at p. 58); Norway (Anon., *ibid.*, 125, 129); Belgium (de Visscher, *Enemy Legislation and Judgments in Liberated Countries*: Belgium, 29 *ibid.*, 1947, p. 46, at pp. 49-52); Netherlands (Jansma, *Enemy Legislation and Judgments in Liberated Countries*: Netherlands, *ibid.*, p. 53, at p. 54).

<sup>31</sup> Oppenheim, vol. I, s. 239; 19 B.Y.I.L., 1938, p. 237, n. 1.

<sup>32</sup> [1937] 1 Ch. 513, 521-2.

the interposition of an intermediate status is in theory unsound,<sup>33</sup> and would, for practical purposes, have a deplorable effect on the question of the Axis occupation of Allied territories.<sup>34</sup>

(Even under the new doctrine, despite additional powers having been accorded to belligerent occupants, it is nevertheless undeniable that the *de jure* government, so long as its efforts at restoration have not been abandoned, continues to enjoy the exclusive right to represent the State, and its acts, wherever they can be made effective, must be treated as the acts of the Sovereign of the State.)<sup>35</sup> Numerous examples can be found during the two World Wars.<sup>36</sup> Between the Wars there were the instances of the Chinese sovereignty over Manchuria, the sovereignty of the Emperor Haile Selassie and the Republican Government over Ethiopia and Spain, respectively. The *de jure* sovereignty of the former government remained legally intact, although the actual administration temporarily fell into the hands of the enemy.

It would be beyond the scope of this work to attempt a detailed study of the position of the various *de jure* governments whose territories had been partially or wholly occupied by *de facto* authorities.<sup>37</sup> The point must, however, be stressed that international law does recognise that, until reduced to impotence and without reasonable hope of return, the *de jure* government carries on the sovereignty over the whole State, including the territory under enemy occupation. (It is the unstable character of the

<sup>33</sup> Baty argues that the so-called *de facto* recognition of insurgent communities is in fact nothing but an exaggerated form of the recognition of belligerency (Baty, *loc. cit.*, n. 49, p. 66 above, p. 469). Phillimore's suggestion of a 'virtual recognition' seems to support the idea of an intermediate recognition (*op. cit.*, n. 21, p. 15 above, vol. 2, p. 20 *et seq.*). Lorimer, though generally sympathetic with this view, thinks that it is little distinguishable from the recognition of belligerency (*op. cit.*, n. 19, p. 15 above, vol I, p. 153).

<sup>34</sup> McNair, *op. cit.*, pp. 343, 354.

<sup>35</sup> *Haile Selassie v. Cable and Wireless Ltd.* (No. 2) [1939] Ch. 182; *Campuzano v. Spanish Government*, Norway, Dis. Ct. of Aker (1938), *Annual Digest*, 1919-1942 (Special Supplement), Case No. 43; *Banco de España v. Federal Reserve Bank of N.Y.*; *same v. U.S. Lines Co.*; *same v. Solomon*, 1940, U.S. Cir. Ct. of App., 2nd Cir., *Annual Digest*, 1938-1940, Case No. 6.

<sup>36</sup> See Oppenheimer, *Governments and Authorities in Exile*, 36 A.J.I.L., 1942, p. 568. See also above, p. 63.

<sup>37</sup> See following literature on the subject: Lachs, *loc. cit.*, p. 57; Schwelb, *Czechoslovakia: Legislation in Exile*, 24 J.C.L., 1942, p. 120; Anon., *ibid.*, p. 125; McNair, *Municipal Effects of Belligerent Occupation*, 57 L.Q.R., 1941, p. 67; Drucker, *The Legislation of the Allied Powers in the United States*, *Czechoslovak Yearbook of International Law*, 1942, p. 45; Schwelb, *The Jurisdiction over the Members of the Allied Forces in Great Britain*, *ibid.*, p. 147; Táborisky, *The Constitutionality of Official Acts of Allied Governments and International Law*, *ibid.*, p. 190.

occupation, and not the recognition by third States, which confers this right upon the *de jure* government,<sup>38</sup> although courts of such third States may have to rely upon the findings of their governments whether the condition of continued effort at restoration still exists and whether there is identity between the exiled government and the former established government.<sup>39</sup>

Decisions by English and American courts during the Second World War have fully demonstrated the principle that the *de jure* but dispossessed government is in all matters the legal sovereign of the State, although in these cases its position had been in no small measure enhanced by the fact of the co-belligerency of the State of the forum. Thus, *In re Amand (No. 1)* (1941)<sup>40</sup> it was held by the King's Bench Division of the English High Court that the conscription laws of the exiled Netherlands

<sup>38</sup> See, however, *In re Savini* (1927) (*Annual Digest*, 1927-1928, Case No. 106), in which it was held by the Court of Appeal of Rome that the exiled Montenegrin Government could not exercise extraterritorial rights of sovereignty in Italy without 'full and formal recognition' by the Italian Government. It may be submitted that the extraterritorial exercise of sovereignty requires, not the recognition of the government by the State of the forum, but the special consent of the local State for the exercise of such rights.

<sup>39</sup> Of the exiled governments in London during the late war, the legitimacy, both constitutional and international, of most (*i.e.*, Norwegian, Greek, Luxembourg, Polish, Yugoslav and Netherlands) was beyond question (although the Netherlands Government had some constitutional difficulties in extraterritorial legislation). The Belgian Government, though minus the King, was, on the whole, identifiable with the former Government (see Oppenheimer, *loc. cit.*, pp. 579-80, 581). In various statements, the British and United States Governments affirmed the *de jure* character of the Netherlands Government (statement of British Attorney-General in *In re Amand (No. 1)* [1941] 2 K.B. 239; statement of United States Government in *Anderson v. N.V. Transandine Handelsmaatschappij* (1942), 289 N.Y. 9, *Annual Digest*, 1941-2, Case No. 4; also in *Re de Bruijn* [1942] 1 D.L.R. 249, Sup. Ct. of Br. Columbia, *Annual Digest*, 1941-2, Case No. 29; *Haak v. Minister of External Affairs* [1942], S.A.L.R., App. Div., 318, *Annual Digest*, 1941-1942, Case No. 30, and the Norwegian Government (statement of British Government in *Lorentzen v. Lydden* [1942] 2 K.B. 202). The Czechoslovak National Council and the Free (Fighting) French, however, had strictly no legal continuity with the previous régimes. See Oppenheimer, *loc. cit.*, pp. 570-4, 576-7, 579-80; Cassin, *Vichy or Free France?* 20 *Foreign Affairs*, 1941-1942, p. 102, at pp. 109-12.

The Czechoslovak Government under Benes was, nevertheless, accorded 'full recognition' in 1941 by Great Britain (Lauterpacht, p. 92, n.; Oppenheimer, *loc. cit.*, p. 581) and provisional recognition by the United States (*ibid.*, p. 571). The legality of such a recognition is doubtful (*contra*, Lauterpacht, p. 92, n.). The British and United States recognition of the Free French as a government was, on the other hand, much delayed (*ibid.*, p. 164, n. 1). In *In re Ortoli* (1942), 59 *Weekly Notes* (N.S.W.) 156, the Australian Minister of External Affairs certified that the Free French constituted an Allied Power (Sup. Ct. of New South Wales, *Annual Digest*, 1919-1942 (Special Supplement), Case No. 6).

<sup>40</sup> [1941] 2 K.B. 239. See also the analogous cases of *Re de Bruijn* [1942] 1 D.L.R. 249, Sup. Ct. of Br. Columbia (*Annual Digest*, 1941-2, Case No. 29); *Haak v. Minister of External Affairs* [1942] S.A.L.R., App. Div., 318 Sup. Ct. of S. Africa (*Annual Digest*, 1941-1942, Case No. 30).

Government were applicable to Netherlands subjects in Britain, but the enforcement of such laws must, however, be dependent upon the British Allied Forces Act, 1940, and Orders-in-Council enacted thereunder.<sup>41</sup> In *Anderson v. N.V. Transandine Handelmaatschappij* (1942)<sup>42</sup> the question was the enforceability of the Netherlands decree of May 24, 1940, purporting to nationalise cash and securities belonging to Dutch nationals domiciled in occupied Holland and which were in the hands of American depositors. The Supreme Court of New York upheld the decree on the ground of comity of nations and on the ground that the decree was conservatory, not confiscatory, and was, therefore, no offence against the public policy of the forum. By the time the case came before the New York Court of Appeals, the United States had entered the war. The Court was able to fortify its judgment by referring to the new policy declared by the Secretary of State.<sup>43</sup> In the cognate case of *Lorentzen v. Lydden & Co.* (1942)<sup>44</sup> the court had to decide on the effect of a Norwegian Order-in-Council<sup>45</sup> made in Norway on May 18, 1940, either before, or in the course of, the establishment of the Norwegian Government in England, which purported to vest in a Norwegian curator the right to collect claims belonging to owners of ships registered in Norway. The defendant was a firm doing business in London, against whom the curator brought action to recover damages for breach of contract. Atkinson J., giving judgment

<sup>41</sup> The applicant, upon obtaining fresh evidence, again challenged the validity of the Netherlands Decree of April 8, 1940. Application for a writ of habeas corpus was denied (*In re Amand* (No. 2) [1942] 1 K.B. 445). The judgment, however, upheld the right of the court to investigate the validity of the decree according to Netherlands laws. See Comments in McNair, *op. cit.*, n. 17, p. 274 above, pp. 372-4; Hartmann, *Conscription in Allied Armies*, 5 M.L.R., 1941-2, p. 256.

<sup>42</sup> (1942) 289 N.Y. 9, *Annual Digest*, 1941-1942, Case No. 4.

<sup>43</sup> *Annual Digest*, 1941-2, at p. 21. See Comments in McNair, *op. cit.*, pp. 368-71; Kuhn, *The Effect of a State Department Declaration of Foreign Policy upon Private Litigation—the Netherlands Vesting Decrees*, 36 A.J.I.L., 1942, p. 651; Lyons, *loc. cit.*, n. 7, p. 225 above, pp. 137-8.

<sup>44</sup> [1942] 2 K.B. 202. See Comments in Mann, *Extraterritorial Effect of Confiscatory Legislation*, 5 M.L.R., 1941-1942, p. 262.

<sup>45</sup> The effect of that Order was considered by a neutral Court in *The Rigmor*, 1942 (*Annual Digest*, 1941-1942, Case No. 63). An application for the arrest of a Norwegian vessel requisitioned under the Order, but subsequently chartered by the British Government, was made while the vessel was in Swedish waters. The application was dismissed by the Swedish Sup. Ct. on the ground of immunity based on British possession. But the court took occasion to state that the requisition carried out in the territory of another State is binding, if it takes place without compulsion (*ibid.*, p. 244). See also *The Solgry*, 1942 (*ibid.*, 1919-1942 (Special Supplement), Case No. 82).

for the plaintiff, said: 'It seems to me that the English courts are entitled to take into consideration the following matters: that this is not a confiscatory decree, see Article 5 of the decree, that England and Norway are engaged together in a desperate war for their existence, and that public policy demands that effect should be given to this decree.'<sup>46</sup>

The principle that the *de jure* government, even if wholly dispossessed, is the government of the State is not affected by the new technique of foreign military occupants to govern through the instrumentality of a servile administration composed of local inhabitants.<sup>47</sup> Such puppet 'governments' are nothing but organs of the occupant. Their acts are his acts, governed by the same rules as the acts of the occupant himself. The military occupant cannot, under the guise of a spontaneous revolution, legally substitute a new government for the displaced *de jure* government.<sup>48</sup> No revolt can change the sovereignty until the occupied area is either evacuated or reduced to small proportions.<sup>49</sup>

<sup>46</sup> At pp. 215-6.

<sup>47</sup> For the establishment of puppet States and governments in Europe, see Lemkin, *op. cit.*, pp. ix, 10-12; *Annual Digest*, 1919-42 (Special Supplement), pp. 286-91; Langer, *op. cit.*, pp. 223, 246. As regards 'Manchukuo', see *Report of the Commission of Enquiry*, Ser. of L.O.N. Pub. VII, Political, 1932, VII, 12, pp. 97, 106. For the plea of spontaneous separatist movement, see Count Uchida's statement in the Japanese Upper House, August 25, 1932, cited in Willoughby, *op. cit.*, n. 3, p. 211 above, p. 374; Cavaré, *loc. cit.*, n. 34, p. 17 above, p. 1.

<sup>48</sup> [See, however, British statement recognising the Emir Idris el Senussi as 'head of the Cyrenaican Government', June 1, 1949. At the time of the statement Great Britain was still occupying the former Italian colonies, and therefore made it clear that only 'steps compatible with (her) international obligations would be taken' (*The Times*, June 2, 1949). This statement is of no international significance—and refers only to the internal administration of Cyrenaica.]

<sup>49</sup> Baty, *op. cit.*, n. 21, p. 15 above, p. 484. See also *ibid.*, p. 210, n. 1, where it is argued that the governments of Joseph Bonaparte in Spain and Maximilian in Mexico were parts of the invading forces rather than internal revolutionary governments. This view was taken by the United States regarding the 'Roman Republic' in 1799 (Sec. Pickering to the United States Consul at Rome, June 11, 1799, Moore, *Digest*, vol. I, p. 129). A separatist movement took place in the Bavarian Palatinate in 1923. The British Government held the view that the occupying Allied Powers should not allow secession to take place (Fauchille, *op. cit.*, n. 24, p. 15 above, t. I, Pt. II, s. 482 (b), p. 10).

The position of the Vichy Government in France was enigmatic. For the argument that it was illegal and illegitimate, see Cassin, *loc. cit.*, p. 102. It was admitted, however, (*ibid.*, p. 110), that the representative character of Vichy was not at first denied. See the judgments of the New York Supreme Court, Special Term, N.Y. County (1941) and New York Supreme Court, Appeal Division (1942) in *Bollack v. Société Générale Pour Favoriser le Développement du Commerce et de l'Industrie en France* (30 N.Y.S. (2d) 83), in which the Vichy Decree was denied application on the ground of public policy, but not on the ground of the lack of governmental capacity (*Annual Digest*, 1941-1942, Case No. 36). In a communication to the President of the Supervisory Commission of the League of Nations, April, 1943, Generals Giraud and de Gaulle

✓ (In conclusion, it may be said that the terms 'de jure' and 'de facto' government (or State) denote the legal quality of a governmental authority in international law; the terms 'de jure' and 'de facto' recognition denote the extent of recognition that is accorded to a foreign State or government. The confusion of the two notions is probably responsible for the innovation of according military occupants treatment normally accorded to State governments.) Admittedly, even under the traditional doctrine, a military occupant is entitled to exercise rights of administration. But the new doctrine is to liberate the occupant from the established limits of international law—such as those provided in the Hague Convention. Social and economic changes may have necessitated a modification of the traditional doctrine. It is nevertheless necessary to accept with reserve the proposition that this necessity has been so great as to justify the disregard of all distinctions between a military occupant and a State government.

repudiated the validity of the notice of withdrawal given by the Vichy Government on April 19, 1941 (Gross, Review of Balossini's *La Perte de la Qualité de Membre de la Société des Nations*, 1945, 40 A.J.I.L., 1946, p. 231). It is questionable whether they were entitled legally to do so. A similar notification of withdrawal was given by the Italian-sponsored puppet Government of Albania, April 13, 1939 (L.o.N. Off. J., 1939, p. 246).

## **PART SIX**

### ***RECOGNITION OF BELLIGERENCY AND INSURGENCY***





## CHAPTER 19

### LEGAL PERSONALITY OF A BELLIGERENT COMMUNITY

IN consequence of the territorial sovereignty of the State, questions of peace and order within the territorial limits of a State are generally considered as matters within the exclusive competence of that State. In exceptional circumstances, disturbances within a State may develop into such dimensions and intensity that their repercussions are felt beyond national borders and the interests of foreign States become directly affected. When such a point is reached, the matter ceases to be a mere question of internal order, and becomes one of which international law is compelled to take cognizance and to regulate.

One school of thought argues that States alone are entitled to wage a legal war. Only States can become lawful belligerents with all the consequences of belligerency.<sup>1</sup> Armed contentions between opposing groups within a State for the purpose of secession or obtaining the power of the State is not war in the technical sense of the word. It is only 'through the recognition of each of the contending parties, or of the insurgents, as a belligerent Power', that such hostilities may acquire the dignity of a real 'war'.<sup>2</sup> Recognition of belligerency is, it is maintained, an act of the parent government or of a foreign State by which a contending party in a civil strife is clothed with the legal qualification to make war, and the legal consequences of the international law of war flow from the moment such recognition is granted. Evidently, this theory is a corollary of the general theory of recognition which conceives an act of recognition as creating or bestowing a capacity or qualification. A political community which is not so bestowed has, according to this view, no status in international law. We have argued against the soundness of this theory with regard to the recognition of States and governments.<sup>3</sup> The same arguments apply to a large measure

<sup>1</sup> Oppenheim, vol. 2, ss. 54, 56, 74.

<sup>2</sup> *Ibid.*, s. 59.

<sup>3</sup> See above, Parts One and Two.

with regard to the recognition of belligerency. These arguments, it is believed, can be applied with even greater force here, as those who argue that an insurgent body can have no right of war until recognised are generally inclined to maintain that such an insurgent body, even if recognised, does not possess legal personality.

According to Oppenheim, a belligerent community has no 'real' international personality. When recognised, it is treated as though it were an international person.<sup>4</sup> It is difficult to explain how an entity which is not a legal person can exercise rights and be subject to duties under the law. This difficulty is clearly illustrated in the contradiction between two of his remarks. In one place he says: 'According to the Law of Nations, full sovereign States alone possess the legal qualification to become belligerents.'<sup>5</sup> In another place he says: 'Whenever a State lacking the legal qualification to make war nevertheless actually makes war, it is a belligerent, the contention is real war, and all the rules of International Law respecting warfare apply to it.'<sup>6</sup> If the latter remark be correct, then the qualification to become belligerent would not be confined to sovereign States. The test whether a body is qualified for belligerency would be whether it is actually making war.

Hall, on the other hand, does not make international personality the exclusive attribute of States. He says: 'Communities possessing the marks of a State imperfectly, are in some cases admitted to the privilege of being subject to International Law, in so far as they are capable of being brought within the scope of its operation.'<sup>7</sup> The criterion of whether a community is a subject of international law is, according to him, not whether it is able to meet the requirements of statehood, but whether it is amenable to international law. This test of legal personality has been adopted by such writers as Salmond,<sup>8</sup> Fiore,<sup>9</sup> and Corbett.

<sup>4</sup> Oppenheim, vol. I, s. 63. [Dr. Schwarzenberger states: 'The recognition of belligerency by either the parent State or third States creates the necessary degree of certainty by the temporary and provisional admission that, as long as the insurgents maintain their *de facto* State organisation and accept the obligations incumbent upon subjects of international law, they are to be treated as if they had international personality' (*op. cit.*, n. 55, p. 22 above, p. 366. Italics added).]

<sup>5</sup> Vol. 2, s. 74, p. 196.

<sup>6</sup> *Ibid.*, s. 75, p. 197.

<sup>7</sup> Hall, p. 23. See also Schwarzenberger, *op. cit.*, p. 45.

<sup>8</sup> Salmond, *op. cit.*, n. 48, p. 18 above, 10th ed., p. 318.

<sup>9</sup> Fiore, *op. cit.*, n. 25, p. 15 above, Article 30.

The last-named writer, writing with reference to the League of Nations, says:

‘If it be conceded then that personality is subjectivity to rights and duties, the States in creating an entity other than a State, with distinct rights and duties, thereby create a person. It is not necessary to inquire, whether the rights and duties appertaining to the entity are among those most characteristic of the State itself; they need only be faculties and obligations defined by the law governing the relations between the creating States.’<sup>10</sup>

It may thus be seen that an entity capable of being subject to international law must be considered as an international person. On this ground it may be argued that a belligerent community must be regarded as possessing international personality. It is true that a belligerent community does not possess all the attributes of a State, yet that does not alone disqualify it as a person in international law.<sup>11</sup>

Whether a belligerent community possesses international personality is a question upon which international lawyers are not in complete agreement. Hall, as we have seen, while admitting other entities than States to international personality, thinks that a belligerent community is not a legal person and can have no rights under international law. It is admitted through recognition to the privileges of international law for the purposes of the hostilities, and such a recognition, he maintains, ‘is from the legal point of view a concession of pure grace’.<sup>12</sup> Oppenheim is less unequivocal. On the one hand, he considers a belligerent community as an ‘apparent’ international person, merely to be treated ‘as though it were a State’. On the other hand, he does not hesitate to admit that once a belligerent community is recognised the civil war becomes a ‘real war’ in international law.<sup>13</sup> Hyde takes a similar stand. While insisting that no political entity which fails to meet the requirements of a State is capable of being treated as an international person, he allows a recognised belligerent community to be clothed ‘with such privileges with

<sup>10</sup> Corbett, *What is the League of Nations?* 5 B.Y.I.L., 1924, p. 119, at p. 142.

<sup>11</sup> Le Normand, *op. cit.*, n. 1, p. 14 above, p. 73. [It should not be forgotten that various entities and bodies may be recognised as possessing international personality for limited purposes only, and such personality does not create statehood, see Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), I.C.J., Reports, 1949, p. 174, at p. 179.]

<sup>12</sup> Hall, pp. 36-9.

<sup>13</sup> Oppenheim, vol. I, s. 63, vol. 2, s. 59.

respect to the outside State as might be fairly claimed were the conflict being waged between two independent powers'.<sup>14</sup>

Other writers are more explicit in their support for the personality of belligerent communities. Hershey, for example, considers them as the only exceptions besides the League of Nations to the exclusive claim of States to international personality. To him, a belligerent community is 'an inchoate or embryonic State', which, when recognised, is admitted to all the rights and duties of a State so far as the conduct of the war is concerned.<sup>15</sup> In the same vein, Lawrence argues that, though belligerent communities are not recognised as sovereign States, 'their governments possess the essential attributes of sovereignty', and that their subjection to international law 'is very real as far as it goes'.<sup>16</sup>

The weakness of the argument of those who deny the legal personality of belligerent communities is apparent. To argue that a belligerent community is not a legal person and, at the same time, that it is permitted to enjoy rights and be subject to duties under international law, is a manifest self-contradiction. Something that is not a legal person is non-existent in the eyes of the law. Rights and duties can only be set in motion by something the law can recognise. A belligerent body must, as a matter of logic, be an international person, or it can exercise no rights and be subject to no duties whatever under international law. Conversely, if a belligerent community does in fact exercise rights and fulfil duties which international law recognises, in its own name and independently of the will of others, it is, by reason of that very fact, an international person. A belligerent body, properly organised, is capable of exercising rights and fulfilling duties under international law in substantially the same manner as a sovereign State in so far as concerns the prosecution of the war, although it does not constitute a State, nor is entitled to represent the State internationally.<sup>17</sup>

<sup>14</sup> Hyde, vol. I, s. 47, p. 198; similarly, Erich, *loc. cit.*, n. 21, p. 15 above, pp. 437-8.

<sup>15</sup> Hershey, *The Essentials of International Law and Organisation*, 1927, p. 157, n. 1, s. 116.

<sup>16</sup> Lawrence, *op. cit.*, n. 5, p. 14 above, s. 41. Other writers arguing for the international personality of belligerent communities include Fiore (*op. cit.*, Article 130), Rougier (*op. cit.*, n. 2, p. 97 above, p. 222) and Bluntschli (*op. cit.*, n. 10, p. 14 above, s. 512, n. 1).

<sup>17</sup> See Lawrence, *loc. cit.*

## CHAPTER 20

### BELLIGERENT COMMUNITY AS A *DE FACTO* GOVERNMENT

It is undoubtedly true that the notion of belligerency is inseparable from the existence of war, and all the rules of international law regulating the conduct of belligerents are primarily concerned with the relations arising out of the conduct of hostilities. A belligerent community either establishes itself in the course of the struggle to become a State or a government of a State, or collapses and is subdued by the established government. In either case, it ceases to exist as soon as the war is at an end. There is, therefore, a large measure of truth in referring to a belligerent community as a military organisation. But that truth is only a part-truth; it over-emphasises the military character of a belligerent community and neglects its capacity as a civil government. Indeed, the aim of a belligerent body is military success. Yet, to achieve such military success it must be able to maintain law and order in the territory under its control, exploit resources, raise men and supply-materials. Thus, it cannot be denied that once a belligerent community is organised, its capacity as a civil government exists side by side with its capacity as a military force.<sup>1</sup>

It cannot be denied that a belligerent community enjoys actual supremacy in the territory under its control and that individuals living therein can have no choice but to submit to such supremacy. A third State cannot, without causing grievous hardships and inequities to the local inhabitants, deny the legal validity of acts of the belligerent community which regulate life within its territory. A belligerent community is a veritable government *de facto*,<sup>2</sup> although only partial

<sup>1</sup> McNair, *op. cit.*, n. 17, p. 274 above, p. 353; Jessup, *The Spanish Rebellion and International Law*, 15 *Foreign Affairs*, 1937, p. 260, at p. 270.

<sup>2</sup> Scelle, *op. cit.*, n. 20, p. 15 above, vol. I, p. 98. [Moore has said that before insurgents are recognised as belligerents they 'must present the aspect of a political community or *de facto* power' (21 *Forum*, 1896, p. 291, *Collected Papers*, vol. 2, p. 100, cited with approval by Neilsen, Commissioner, in his dissenting opinion in the *Oriental Navigation Co. claim* (1928) (*Opinions of Commissioners*, 1929, p. 32).]

and temporary and not representing a State in international relations.

There has been a recent tendency in English courts to take a broader view of the legal capacity of belligerent communities.<sup>3</sup> This view seems to have been concurred in by Professor Smith, who writes:

‘Once the decision has been taken to recognise an insurgent government as belligerent, the legal consequences of the decision are not limited to its concession of belligerent rights. So long as it maintains an independent existence, the insurgent government is considered to have all the normal rights and liabilities of a State. Its legal position is not merely that of a military occupant as defined by the Hague Convention No. IV of 1907.’<sup>4</sup>

The width of the legal competence of a belligerent community can only be determined by examining the practice of nations. The practice of nations in this matter, however, has been neither uniform nor consistent. A State in whose territory a rebellion is taking, or has taken, place adopts an attitude often quite at variance with those of other States, and even the same State may be found to take different views on different occasions according to whether the rebellion has taken place in its or another’s territory. However, the general trend evinced from the practice of States and judgments of courts, both national and international, seems to be one of allowing more rein to belligerent communities.

#### § 1. FROM THE POINT OF VIEW OF THE ESTABLISHED GOVERNMENT

Let us first consider the views of nations which have had the misfortune of having civil wars waged on their own soils. The latest<sup>5</sup> instance in English history where a revolutionary party succeeded in establishing a local *de facto* government is the American War of Independence. That war, unfortunately,

<sup>3</sup> See above, p. 293.

<sup>4</sup> Smith, vol. I, p. 325; same, *Some Problems of the Spanish Civil War*, 18 B.Y.I.L., 1937, p. 17.

<sup>5</sup> The Irish dispute of 1919-1922 was considered by the Irish Supreme Court as a rebellion and Dail Eirean was considered to have constituted a *de facto* government, *Fogarty v. O'Donoghue* [1926] I.R. 531. Held contrary by the Supreme Court of New York, in *Irish Free State v. Guaranty Safe Deposit Co.* (1927) 129 Misc. 551; 222 N.Y.S. 182; Hudson, p. 760. [Similarly, the ‘Provisional Government of Free India’ set up by Bose during the Second World War and recognised by Germany, Italy, Japan and their satellites was regarded by Great Britain as a traitorous body, see Green, *The Indian National Army Trials*, 11 M.L.R., 1948, p. 47.]

yielded only a few reported decisions by English courts. In the first two of these cases (*Wright v. Nutt* (1788), *Folliott v. Ogden* (1789)) the court admitted that the laws of the revolting colonies were laws of an independent State, but in subsequent cases (*Ogden v. Folliott* (1790), *Dudley v. Folliott* (1740)) their validity was rejected, on the ground, *inter alia*, that they had emanated from unlawful authorities.\*

The courts of the United States had on numerous occasions to decide upon the validity of the legislation of the Confederacy. They generally refused to recognise such legislation on two conditions, namely, where the legislation was hostile to the United States and where it was against the rights of loyal citizens, who during the war resided outside the territorial limits of the Confederacy.

*Thorington v. Smith* (1868)<sup>7</sup> is a case in which the United States Supreme Court upheld the validity of a private contract in Confederacy currency. The court held that, although the authority of the Confederacy did not originate in a lawful war, 'in all matters of government within its military lines the power of the insurgent government cannot be questioned'.<sup>8</sup>

In *Williams v. Bruffy* (1877)<sup>9</sup> the question was whether the sequestration of some goods in accordance with Confederate law could be set up as a bar to an action for the breach of a sales contract made during the Civil War between a person residing in Pennsylvania and another in Virginia. The Supreme Court of the United States reiterated the principle of its decision in *Horn v. Lockhart* (1873)<sup>10</sup> that acts of a local *de facto* government, apart from those which were hostile to the established government or impaired the rights of loyal citizens, were in general to be treated as valid and binding.<sup>11</sup>

In *Sprott v. United States* (1874)<sup>12</sup> the Supreme Court of the United States had to consider the capacity of the Confederate

\* See above, pp. 158, 172.

<sup>7</sup> (1868) 8 Wall. 1. Followed in *Delmas v. Ins. Co.* (1871) 14 Wall. 661; *The Confederate Note Case* (1873) 79 Wall. 548; *Bissell v. Heyward* (1877) 96 U.S. 580. Approved but distinguished in *Hanauer v. Woodruff* (1872) 15 Wall. 439, 448.

<sup>8</sup> At p. 11.

<sup>9</sup> (1877) 96 U.S. 176.

<sup>10</sup> (1873) 17 Wall. 570.

<sup>11</sup> At p. 192. The same principle was applied in *Texas v. White* (1868) 7 Wall. 700, 733.

<sup>12</sup> (1874) 20 Wall. 459.



government to take, hold or convey title to property. Though the court based its judgment on other grounds, the *de facto* character of the Confederate government was brought into prominence by the dissenting opinion of Justice Field. The claimant, it appears, claimed title to some cotton which he had bought from an agent of the Confederate Government. The Court of Claims decided against him on two grounds: (a) that the government of the Confederate States was an unlawful assembly, and (b) that the sale of cotton by the Confederate Government had treasonable intent and was illegal. In affirming the judgment, the Supreme Court relied mainly on the second ground. While 'no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its (the Confederacy's) unlawful purpose', the court nevertheless conceded that 'So far as the actual exercise of its physical power was brought to bear upon individuals, that may, under some circumstances, constitute a justification or excuse for acts otherwise indefensible . . .'<sup>13</sup> The court, in basing its judgment upon the second ground, naturally found it unnecessary to decide upon the question of the general validity of the acts of the Confederacy. It fell upon Justice Field, who, in his dissenting opinion, denied that the transaction was in aid of the rebellion, to take up the point. He claimed that it was a principle recognised 'by all writers on international law, . . . that a government *de facto* has, during its continuance, the same right within its territorial limits to acquire and to dispose of movable personal property which a government *de jure* possesses'.<sup>14</sup> He pointed out that in *United States v. McRae* (1869)<sup>15</sup> and *United States v. Prioleau* (1865)<sup>16</sup> the Government of the United States had asserted its right to succeed to Confederate property which the Confederate Government had the capacity to acquire and own, and this view was concurred in by the English courts.

*Baldy v. Hunter* (1897)<sup>17</sup> decided thirty years after the war, having profited by a generation of judicial experience, may probably be taken as a mature pronouncement of the law on this

<sup>13</sup> (1874) 20 Wall. 459, p. 465.

<sup>14</sup> *Ibid.*, p. 471.

<sup>15</sup> (1869) L.R. 8 Eq. 69.

<sup>16</sup> (1865) 2 H. and M. 559.

<sup>17</sup> (1897) 171 U.S. 388.

matter. In this case the court was asked to decide whether an investment during the war by a guardian of money of his ward in bonds of the Confederate States was unlawful, both parties being residents within Confederate territory. Giving answer in the affirmative, the court proclaimed the following principles, which may be regarded as the settled view of the American courts :

‘ That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognising its authority;

‘ That within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates and the transfer and descent of property, and similar or kindred subjects were, during the war, under the control of the local governments constituting the so-called Confederate States;

‘ That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid merely because those governments were organised in hostility to the Union established by the national Constitution, this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organised within the enemy’s territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organised to effect a dissolution of the Union, were without blame “ except when proved to have been entered into with actual intent to further invasion or insurrection ”; and,

‘ That judicial and legislative acts in the respective States composing the so-called Confederate States should be respected by the courts if they were not “ hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the constitution ”.’<sup>18</sup>

<sup>18</sup> (1897) 171 U.S. 388, pp. 400-1.

## § 2. FROM THE POINT OF VIEW OF THIRD STATES

The question of the position of belligerent communities from the point of view of third States may be examined under the headings of act of government, legislation, and succession.

*Act of government.* Some of the earlier cases decided in the English Court of Chancery related to the revolution in the Spanish American Colonies. The issues in those cases were unfortunately distorted and were confused with the question of the recognition of independence.<sup>19</sup> The Court did not seem to consider the problem of recognition as anything but the recognition of independence. Consequently, the principle underlying these decisions seems to suggest that a community, if not recognised as an independent State, can be recognised as nothing at all. Thus, in *Doloret v. Herring and Co.* (1823), when a motion was made for an injunction to restrain the contractors of a loan for the unrecognised revolutionary Colombian Government from sending out the money held by them, Lord Eldon observed that, since the Colombian Government had not been recognised by the British Government, the court must ignore its character as a government.<sup>20</sup> Similar decisions were given in *Jones v. Garcia del Rio* (1823)<sup>21</sup> with regard to a contract for loans to the unrecognised Peruvian Government, and *Thompson v. Powles* (1828)<sup>22</sup> with regard to purchase of Guatemalan securities. In these cases, the court did not seem to regard the status of a belligerent community as entitled to any consideration so long as its independence had not been recognised.

In the Common Law Courts, a similar decision was given in *Henderson v. Bise* (1822).<sup>23</sup> It was held that in Section 7 of the Act 7 Geo. II, C. 8, the expression 'public stocks and securities' must be taken to mean 'securities recognised by the British Government' and was not applicable to 'Colombian bonds'. But in other cases regarding Spanish America, a different line of

<sup>19</sup> Walker, *Recognition of Belligerency and Grant of Belligerent Rights*, 23 *Grotius Transactions*, 1937, p. 178.

<sup>20</sup> *The Times*, January 21, 1823. The case was not finally disposed of until March 25, *The Times*, March 26, 1823. This and the following cases decided in the Court of Chancery have been reviewed in Bushe-Fox, *loc. cit.*, n. 8, p. 136 above, p. 63.

<sup>21</sup> (1823) Turn. & R. 297.

<sup>22</sup> (1828) 2 Sim. 194.

<sup>23</sup> *The Times*, November 1, 1822.

reasoning was followed. In *Kinder v. Everett* (1823)<sup>24</sup> an agent of the unrecognised State of Peru was awarded the sum on the account of the Peruvian State of which he claimed to be custodian. In *Revenge v. Mackintosh* (1824)<sup>25</sup> evidence was admitted to prove the official position of a person claiming to be the envoy of the unrecognised Republic of Colombia. In *Yrissari v. Clement* (1826)<sup>26</sup> a document bearing the seal of the unrecognised Chilean State was allowed in evidence to prove a person's position as Chilean envoy. Although these cases may be taken to illustrate the practice of courts to give judicial acknowledgment of States not recognised by the executive department,<sup>27</sup> they also show that an insurgent body, while not constituting an independent State, may, nevertheless, have some status in foreign courts.<sup>28</sup>

In *The Dart and The Happy Couple* (1805),<sup>29</sup> decided by the Vice-Admiralty Court at Halifax, Nova Scotia, the court did not deny the *de facto* change in the situation of St. Domingo, then in revolt against France, though it deferred to the government for a definition of the legal position. In similar cases shortly afterwards,<sup>30</sup> when certain Orders-in-Council had permitted British vessels to trade at ports in St. Domingo not under actual French control, Lord Stowell held that such ports were no longer to be regarded as enemy ports. The judgment seems to suggest that an insurgent body, having in fact freed itself from the control of the parent government, must, from the point of view of international law, be considered as constituting a separate entity.<sup>31</sup>

The assertion by an insurgent body of the right of neutrality as against the enemies with whom its parent government was at war was, however, denied in *The Mary* (1814).<sup>32</sup> An American

<sup>24</sup> *The Times*, December 22, 1823.

<sup>25</sup> (1824) 2 B. & C. 693; *The Times*, April 23, May 7, 1824.

<sup>26</sup> (1826) 3 Bing, 432.

<sup>27</sup> Bushe-Fox, *Unrecognised States; Cases in the Admiralty and Common Law Courts*, 13 B.Y.I.L., 1932, p. 39; also above, p. 244.

<sup>28</sup> It may be noted that the British Government, in revoking its previous embargo on arms on February 21, 1823, had impliedly recognised the belligerency of the Spanish Colonies (Smith, vol. I, p. 279).

<sup>29</sup> Stewarts, Vice-Adm. Cases, Nova Scotia, 65.

<sup>30</sup> *The Manilla* (1808) Edw. 1; *The Pelican* (1809) Edw. Appendix D.

<sup>31</sup> It may be argued that the fact that Great Britain was at war with France at the time could not fail to introduce elements of irregularity into the case. A contrary decision was given by an American court in *Clark v. U.S.* (1811) 3 Wash. C.C. 101, Fed. Cases, II, 838, cited in Jaffe, *op. cit.*, n. 21, p. 15 above, p. 132.

<sup>32</sup> See Bushe-Fox, *loc. cit.*, p. 40.

privateer was captured by a British warship in a port occupied by Venezuelan insurgents. The insurgent Government protested on the ground of the violation of its neutrality and the Vice-Admiralty Court at Tortola refused to condemn the vessel. On appeal the decision was reversed on the ground that Venezuela was not recognised.

During the latter half of the nineteenth century the British attitude towards the recognition of the *de facto* capacity of insurgent communities became less and less hesitant. In an opinion of June 8, 1861,<sup>33</sup> regarding the power of the insurgent government in New Granada to levy duties upon British goods, the Queen's Advocate, Sir James Harding, advised that, as the British Government desired to remain neutral, it could not dispute the right of the *de facto* government of the seceded States to maintain law and order, and to levy customs duties at its ports. In another opinion<sup>34</sup> regarding the insurrection in St. Domingo, Harding said:

‘Each *de facto* government engaged in a civil war is “*prima facie*” a regular government in relation to those Foreign Nations who remain neutral, and is entitled as such to exercise complete sovereign authority within the territory actually in its power.’

In this case it was thought that the regulation of currency and the forbidding of the circulation of certain kinds of paper money was within the sovereign authority ordinarily exercised by, and incident to, regular governments.

In the United States, early decisions of the Supreme Court have definitely settled upon the principle that belligerent communities are entitled to the rights of war, and their acts with respect to such matters are valid in neutral courts.<sup>35</sup> In *Kennett v. Chambers* (1852)<sup>36</sup> the court refused to uphold a loan made to Texas which was in revolt against Mexico. The ground was, however, not that Texas had no capacity to make contracts, but that the loan was in violation of the neutrality of the United States. As regards the capacity of belligerent communities for civil government, President Grant's special message to Congress

<sup>33</sup> Smith, vol. I, p. 327.

<sup>34</sup> Dated April 14, 1858 (*ibid.*, p. 329).

<sup>35</sup> *U.S. v. Palmer* (1818) 3 Wheat. 610; *The Divina Pastora* (1819) 4 Wheat. 52; *The Josefa Segunda* (1820) 5 Wheat. 338.

<sup>36</sup> (1852) 14 How. 38. See criticisms in Jaffe, *op. cit.*, p. 126, n. 9.

on June 13, 1870, is in point. In this message the President laid down as a condition for the recognition of belligerency that—

‘There must be, above all, a *de facto* political organisation of the insurgents sufficient in character and resources to constitute it, if left to itself, a State among nations capable of discharging the duties of a State, and of meeting the just responsibility it may incur as such toward other powers in the discharge of its international duties.’<sup>37</sup>

If the possession of capacity for civil government is a condition for the recognition of belligerency, it cannot be argued that a belligerent community so recognised does not possess the capacity for civil government.

Among the various functions of government which an insurgent government undertakes to exercise, the one, the validity of which has received the practically unanimous support of authorities, is in the matter of the collection of taxes and duties in the territories under its control.

In numerous instances during or after revolutions in the Latin American Republics the question arose whether customs duties, taxes, or dues collected by the insurgent body were valid as against the established government when the place or the object in question passed under the control of the latter. The United States consistently took the view that the revolutionary body is entitled to the obedience of the residents within the territory under its control and submission to it on the part of the people is not wrongful and, therefore, the established government is not entitled to a second payment.<sup>38</sup> ‘The obligation of obedience to a government at a particular place, in a country,’ wrote Secretary Fish, ‘may be regarded as suspended, at least, when its authority is suspended, and is due to the usurpers, if they choose to exercise it.’<sup>39</sup>

The same policy was followed by the United States in regard to the collection of taxes by the Confederate Government. Suits for the repayment of such taxes originally instituted were later

<sup>37</sup> Moore, *Digest*, vol. I, p. 194; *Dana's Wheaton*, s. 23, n. 15.

<sup>38</sup> Moore, *Digest*, vol. I, pp. 49-51. The United States protested against taxes and forced loans imposed by insurgent governments only when they appeared to be discriminatory or confiscatory (Hackworth, vol. I, pp. 137-42).

<sup>39</sup> Fish to Nelson, U.S. Minister to Mexico, February 11, 1873, regarding the demand of the Mexican Government for a second payment from British merchants at Mazatlan, who had previously paid duties to the insurgents (Moore, *Digest*, vol. I, p. 49).

discontinued, in view of the Supreme Court decision in *United States v. Rice* (1819).<sup>40</sup> The same position was taken by the United States in *Speyers v. The United States*<sup>41</sup> and in the *Bluefields Controversy* (1899).<sup>42</sup>

This view has also been adopted by international arbitral tribunals.<sup>43</sup> In the *Guastini* case (1903),<sup>44</sup> however, the ground for the award was slightly different from the doctrine expounded by Secretary Fish. Instead of basing the right of insurgents to collect duties on the ground of obedience by the people, the Commission argued on the ground of local benefits. Since the legitimate government performed no act of government, it was held that it was not entitled to collect anew taxes 'once paid to insure the benefits of local government'.<sup>45</sup>

International practice is less uniform as regards other acts of belligerent communities. In cases where the insurgent government is in possession of ports, foreign maritime States would find themselves faced with the alternative either to acquiesce in certain consular functions being exercised by agents of the insurgent government or to stop the trade with those ports altogether. Maritime nations have been reluctant to adopt the latter course.<sup>46</sup>

On the question whether the title to property can be changed by the acts of insurgent governments, the English cases *U.S. v. Prioleau* (1865)<sup>47</sup> and *U.S. v. McRae* (1869)<sup>48</sup> have answered in the affirmative. In the United States, however, opinions seem to be divided. In *O'Neil v. Central Leather Co.* (1915)<sup>49</sup> the

<sup>40</sup> (1819) 4 Wheat. 246.

<sup>41</sup> Moore, *International Arbitrations*, vol. III, pp. 2868, 2870.

<sup>42</sup> Moore, *Digest*, vol. I, pp. 50-1.

<sup>43</sup> E.g., U.S.-French Mixed Claims Com. in the *De Forge* case, 1880 (Moore, *International Arbitrations*, vol. III, p. 2781); Italo-Venezuelan Mixed Claims Com. in the *Guastini* case, 1903 (Ralston, *Venezuelan Arbitration of 1903*, 1904, p. 730); U.S.-Mexican Claims Com. (1868) in *Adams v. Mexico* (Moore, *op. cit.*, 3065), *Virginia Antoinette* (*ibid.*), and *Speyers v. U.S.* (*ibid.*, 2868).

<sup>44</sup> Ralston, *loc. cit.*

<sup>45</sup> Opinion of Ralston, Umpire, *ibid.*, p. 751.

<sup>46</sup> See Communication of Secretary Seward to the Mexican Minister, August 9, 1865, regarding the activities of commercial agents of the Maximilian Government (*Dana's Wheaton*, s. 76, n. 41, p. 110). See also the communication of the State Department to the Spanish Ambassador, July 31, 1914 (Hackworth, vol. I, p. 143).

<sup>47</sup> (1865) 2 H. & M. 559; see below, p. 324.

<sup>48</sup> (1869) L.R. 8 Eq. 60; see below, p. 324.

<sup>49</sup> (1915) 87 N.J.L. 552, 555, 559; 94 Atl. 789, 791, 792; cited in *Compania Minera Ygnacio Rodriguez Ramos v. Bartlesville Zinc Co.*, below, n. 50, at p. 182.

Court of Errors and Appeals of New Jersey held that the Villa faction in Mexico had the belligerent right to confiscate property and could pass valid title to purchasers. The Supreme Court of Texas, however, took a contrary view in *Compania Minera Ygnacio Rodriguez Ramos v. Bartlesville Zinc Co.* (1925),<sup>50</sup> which arose from substantially the same circumstances. In rejecting *O'Neil v. Central Leather Co.*, the Court said that the recognition as a belligerent 'could not be referred to as any sort of recognition of it as a government',<sup>51</sup> and that when such a government of paramount force fails, it leaves nothing behind. 'Its contracts are void, it has no power or ability to compensate for property taken, and its acts of seizure, as far as passing title to the property seized and sold, are also nullities and cannot pass title.'<sup>52</sup>

An interesting case arose during the Congressionalists revolt against the Balmaceda Government in Chile.<sup>53</sup> An American firm obtained a concession to lay a submarine cable in Chile. Article 9 of the concession provided: 'The Government reserves the right of suspending the service or the use of the cable in case of danger to the security of the State.' Among other complaints, the company claimed damages from the Chilean Government for the suspension of the use of the cable by the Congressionalists during the revolution. The Chilean Government, paradoxically, contended that the Congressionalist party was a *de facto* government and had the right to suspend the use of the cable under Article 9 to the same extent as the legitimate government. The Mixed Claims Commission found for Chile on the ground that 'the party of the Congressionalists had the character of a *de facto* government, possessing in the territory subject to its dominion the right to exercise jurisdiction according to the laws enacted and engagements accepted by and for the country. . . .' The last remark seems even to go as far as to say that an insurgent government could act in the name of the whole State.<sup>54</sup>

*Legislation.* Little judicial authority can be found in earlier cases with regard to the legal capacity of a local *de facto* government to enact laws that can be regarded as valid by foreign States.

<sup>50</sup> (1925) 115 Tex. 21, 275 S.W. 388, 41 A.L.R. 737, Hudson, p. 179.

<sup>51</sup> *Ibid.*, p. 181.

<sup>52</sup> *Ibid.*, p. 182.

<sup>53</sup> *Central and South American Telegraph Co. (U.S.) v. Chile* (1894), Moore, *International Arbitrations*, vol. III, p. 2938.

<sup>54</sup> See criticism in Borchard, *op. cit.*, n. 61, p. 129 above, p. 211.



The circumstances in *The Gagara* (1919)<sup>55</sup> bore some resemblance to a situation arising out of a civil war. But the Estonian National Council which was engaged in hostilities with the Soviet Government was considered by some writers to be, not an insurgent body in a civil war against the legitimate (Soviet) government, but rather a partial successor of the Russian Empire, engaged in war with a foreign government.<sup>56</sup> The case is, therefore, not illustrative of the legislative capacity of a belligerent community.

During the Spanish Civil War, the question of the legal status of belligerent communities aroused wide interest, principally as the result of several cases decided in English courts. In *Banco de Bilbao v. Sancha; Same v. Rey* (1938),<sup>57</sup> the plaintiff was a bank incorporated under Spanish law with its head office at Bilbao in the Basque country. The Basque Government issued a decree on December 23, 1936, purporting to amend the constitution of the bank, and, on January 5, 1937, issued an order under that decree for the reorganisation of the board of directors. When the suit was instituted, the defendants disputed the validity of the order and the right of the plaintiffs to sue in the name of the bank. It was held by the court of first instance that the Basque decree was *ultra vires* the legislative authority of the Basque Government under the law of October, 1936. The plaintiffs were, therefore, not the directors of the bank. The plaintiffs appealed. Before the appeal was heard (in February, 1938), the Nationalist insurgents had occupied Bilbao (on June 10, 1937). The plaintiffs then moved the head office of the bank from Bilbao to places under the control of the Republican Government. On August 22 and September 30, 1937, the Republican Government issued decrees transferring the head offices of all companies whose head offices were in the Basque country to Barcelona or Valencia, and validating retrospectively the Basque Banking Decree of December, 1936, and all acts done under it. The Nationalist Government also issued decrees on December 29, 1937, nullifying all changes in the legal domicile of Basque companies made since July, 1936, and all proceedings by the Republican Government against the original directors of the bank. The

<sup>55</sup> [1919] P. 95.

<sup>56</sup> McNair, *op. cit.*, p. 345, n. 4.

<sup>57</sup> [1938] 2 K.B., 176.

issue before the Court of Appeal was which of the conflicting laws should be applied.

The Court decided, in the first place, that the law governing the statutes of the bank should be the law of the place of the corporate domicile, Bilbao. As there were at the time two governments claiming jurisdiction over that territory, the question was referred to the Foreign Office. In a letter of February 17, 1938, to the solicitors, the Foreign Office stated that the Government set up by the Nationalists in the Basque country since their capture of Bilbao on June 19, 1937, was recognised by His Majesty's Government as the Government which exercised *de facto* administrative control over a considerable portion of the Basque country including Bilbao, and that His Majesty's Government recognised the Republican Government of Spain as the *de jure* government of the whole of Spain, including the area in which it recognised the Nationalist Government as exercising *de facto* administrative control.

Relying upon the principles of *Luther v. Sagor* (1921),<sup>58</sup> *White, Child and Beney, Ltd. v. Eagle Star and British Dominion Ins. Co., Ltd.* (1922),<sup>59</sup> and *Bank of Ethiopia v. National Bank of Egypt* (1937),<sup>60</sup> the court decided that 'no regard can be paid for the present purpose to the legislation enacted by the Republican Government, which during the material period cannot be treated in this court as the Government of the area in which Bilbao is situated', and, therefore, the Nationalist decree should be applied.

This was a very strong case.<sup>61</sup> Not only was it held that the laws of an insurgent government are entitled to the respect generally accorded to the laws of a sovereign State, but it was also held that such laws are superior to any other law concerning matters within the territorial limits of that government, even the laws of the rival government which is still recognised *de jure* by the government of the forum. It is possible that the court had understood the Foreign Office statement as meaning that some sort of '*de facto recognition*' as State government had been

<sup>58</sup> [1921] 1 K.B. 456; 3 K.B. 532.

<sup>59</sup> (1922) 38 T.L.R., 367, 616.

<sup>60</sup> [1937] Ch. 513.

<sup>61</sup> The case of *Bank of Ethiopia v. National Bank of Egypt*, *supra*, is closely resembling, but it concerned a situation arising out of an international, rather than a civil, war.

accorded by the executive department. However, as a belligerent community, the power allowed to it by the court is definitely wider than that permitted by the Hague Convention of 1907.<sup>62</sup>

In *The Cristina* (1938)<sup>63</sup> a Spanish ship registered at Bilbao was requisitioned by the Republican Government of Spain after the fall of Bilbao to the insurgents. The question of the validity of the requisition decree was, however, prevented from being decided upon by the House of Lords owing to the sovereign immunity of the Spanish Government. Had it not been so, it would have raised a nice question how far decrees of a legitimate Government may affect ships registered at places under the control of insurgents.<sup>64</sup> A very similar case decided in a Dutch court seemed to have shed some light on this question.

In this case, *The Sendeya* (1937),<sup>65</sup> the court refused to grant leave to the Spanish Government to detain in a Dutch port a ship which was registered at Bilbao. It was held that the requisition decree of the Republican Government was promulgated after the fall of Bilbao. Since the Spanish Government was unable to fulfil its duty of protecting its subjects living at Bilbao against an internal enemy, it would not be entitled to compel them to collaborate with it in combating the enemy in whose power they were and thus expose them to great danger in respect of their lives, liberty and property. The application of the requisition decree to the owners who were domiciled in Bilbao was considered as contrary to the rules of public morality prevailing in Holland.

The case of *The Arantzazu Mendi* (1939)<sup>66</sup> must, in every respect, be regarded as one of the most notable decisions in recent years. Here the House of Lords was, for the first time, brought face to face with the principle evolved in the lower courts regarding the legal position of belligerent communities. The circumstances in this case were substantially the same as in the two cases discussed above. The *Arantzazu Mendi*, a Spanish ship registered in Bilbao, was requisitioned by both the Republican and the Nationalist Governments, but the master undertook to hold the ship for the

<sup>62</sup> Above, pp. 293-6.

<sup>63</sup> [1938] A.C. 485.

<sup>64</sup> See Note, 19 B.Y.I.L., 1938, p. 244, n. 1.

<sup>65</sup> District Court of Haarlem (1937); *Annual Digest*, 1935-1937, Case No. 74.

<sup>66</sup> [1938] P. 233; [1939] P. 37; [1939] A.C. 256.

Nationalists. Thereupon the Republican Government issued a writ *in rem* for possession of the ship and served a warrant of arrest. The Nationalist Government moved to set aside the writ and warrant on the ground that the action impleaded a foreign sovereign State.

The questions for decision were: (a) Was the Nationalist Government entitled to sovereign immunity? (b) If it was so entitled, did the process amount to impleading such a sovereign?

In reply to an enquiry whether the Nationalist Government was 'recognised as a foreign Sovereign State', the Foreign Office stated its view in a letter dated May 28, 1938, the relevant parts of which were as follows:

- (1) 'His Majesty's Government recognise (*sic*) Spain as a foreign sovereign State.
- (2) 'His Majesty's Government recognises the Government of the Spanish Republic now having its seat in Barcelona as the *de jure* Government of Spain. . . .
- (5) 'His Majesty's Government recognises the Nationalist Government as a Government which at present exercises *de facto* administrative control over the larger portion of Spain. . . .
- (8) 'The Nationalist Government is not a Government subordinate to any other Government in Spain.
- (9) 'The question whether the Nationalist Government is to be regarded as that of a foreign sovereign State appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised.'<sup>67</sup>

On the basis of this letter, Bucknill J. answered both of the questions in the affirmative. In answer to the question how a single State could have two governments, the learned judge said:

'It may seem a contradiction in terms, that there should be two sovereign governments in Spain. There may be in the eyes of international law two sovereigns, one *de facto*, and one *de jure*, in the same country. It seems to me that the law, based on the reality of facts material to the particular case, must regard as having the essentials of sovereignty a government in effective administrative control over the territory in question and not subordinate to any other government, because its decrees are the

<sup>67</sup> [1938] P. 242-3.

only legal authority which governs the area to which the subject matter of the dispute belongs.’<sup>68</sup>

The judgment was affirmed by the Court of Appeal. Slesser L.J., in support of the argument of Bucknill J. that two governments may exist in one State, said:

‘ Even if there was no authority to that effect, I should myself unhesitatingly take the view that once it is found as a fact that within certain boundaries . . . there was a *de facto* government, the mere fact there was another government, claiming to be the *de jure* government, in that area, in the unit which is called Spain, if it be a unit, would not deprive the court of the duty of finding, on that statement, that the *de facto* government—which points to some orderly and organised institution—is so organised in that area, although fluctuating, as to possess the powers of a State.

‘ In those circumstances I think that it is a proper conclusion that the Spanish Nationalist Government has been recognised by His Majesty *de facto*, and must be regarded by the Court as a sovereign State.’<sup>69</sup>

In the House of Lords the judgment was again affirmed. Since the House regarded the recognition by the Government as a recognition of a sovereign government it was almost bound to hold a broad view of the capacity of the insurgent government thus recognised. Lord Atkin, delivering the opinion of the House, said:—

‘ By “ exercising *de facto* administrative control ”, I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws, regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In these circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that territory is to recognise it as sovereign, and for the purpose of international law as a foreign sovereign State.’<sup>70</sup>

<sup>68</sup> [1938] P. 233, p. 245.

<sup>69</sup> [1939] P. 45.

<sup>70</sup> [1939] A.C. 264-5.

The judgment has met with a mixed reception from international lawyers. Professor Lauterpacht<sup>71</sup> thinks that, while *de jure* recognition is not permissible during war, *de facto* recognition is, however, unobjectionable. But an insurgent body so recognised may possess not all the attributes of the State, but only those concerning the validity of internal acts.

It is believed that the correctness of the judgment depends upon the interpretation of the Foreign Office letter. If it is meant by that letter that the British Government had recognised the Nationalists as a State Government, though the recognition was *de facto*, then the according of immunity would be fully justified (in which case, the British Government would be committing an offence against the Republican Government of Spain, as the recognition would be *durante bello*). If, on the other hand, the recognition was merely that of a local *de facto* authority, it would be arguable whether it was entitled to sovereign immunity. There is no doubt that a belligerent community possesses certain characteristics of government. But it is quite another matter to say that because it possesses these characteristics it must be regarded as none other than the government of a sovereign State.<sup>72</sup>

The correct interpretation of the Foreign Office letter would seem to be that the *de jure* government at Barcelona was the Government of Spain. The Nationalist régime did not represent a State recognised by Great Britain, but was recognised as a local *de facto* authority over a particular part of Spain. Whether such a recognition might be regarded as the recognition of a sovereign State and what rights it was entitled to exercise were questions of law to be answered by the court. It is suggested that the court should have said that the recognition of the Nationalist régime as the government of a State had not been established. Upon the basis of this circumstance, the court might then decide whether the right of immunity may be accorded to a local *de facto* authority.<sup>73</sup>

*Succession.* The necessity of treating a belligerent body as a *de facto* government may be further shown in matters of succession. Where a belligerent community is finally suppressed

<sup>71</sup> Lauterpacht, p. 294.

<sup>72</sup> This seems to be the argument of Lord Atkin, quoted above.

<sup>73</sup> *Accord*, Briggs, *loc. cit.*, n. 1, p. 268 above, p. 689. See also Baty, *loc. cit.*, n. 24, p. 293 above.

and leaves behind it a bundle of rights and obligations, it is often found impossible to ignore them or to treat them as belonging to the private individuals who once composed the government.<sup>74</sup> Where the property of the rebel government is found within the territory of a foreign State a distinction is made between that which formerly belonged to the parent State and has been seized by the rebel government, and that which has been acquired by the rebel government itself. In the former case, the property can be recovered by the established government in a foreign court by title paramount; in the latter case, it is recoverable by virtue of its right of succession.<sup>75</sup>

An illustration of the former situation may be found in *King of the Two Sicilies v. Willcox* (1850).<sup>76</sup> The rebellious subjects of the King possessed themselves of some property of the King. It was held by Shadwell V.C. that the rebels 'did not acquire, therefore, any right to the property as against their sovereign.'<sup>77</sup>

For recovery by succession, two cases—*U.S. v. Prioleau* (1865)<sup>78</sup> and *U.S. v. McRae* (1869)<sup>79</sup>—are illustrative. In both cases the question was not only the succession to rights, but also that to correlative obligations. In both cases the fact of the existence of the rebel body as a *de facto* government was emphasised, and it was strongly hinted that only in virtue of this fact was any succession possible.

In *U.S. v. Prioleau* (1865) Sir W. Page Wood, V.C., said:

'If the case had been that of a body of mere robbers devastating and plundering the territory of the United States, our courts might have interfered to restore the property so acquired; but then the rightful claimants would have been not the United States Government, but the persons who had been robbed. *It is only because the money was raised by a de facto government*

<sup>74</sup> The abortive revolutionary movement in Ireland before 1922 was held by the Sup. Ct. of New York to have failed to constitute a government, and funds collected for the revolution were returned to the original contributors. See *Irish Free State v. Guaranty Safe Deposit Co.* (1927), 129 Misc. 551; 222 N.Y.S. 182.

<sup>75</sup> Oppenheim, vol. I, p. 157.

<sup>76</sup> (1850) 1 Sim. (N.S.) 332.

<sup>77</sup> *Ibid.*, 333.

<sup>78</sup> (1865) 2 H. & M. 559.

<sup>79</sup> (1869) L.R. 8 Eq. 69.

*that the United States can come here to claim at all. Had the money been obtained by mere robbery it would never have become public property. It only acquired that character because it was levied by an authority exercising rights of government.'*<sup>80</sup>

*U.S. v. McRae* (1869) is a case in which the United States Government claimed against an agent of the suppressed Confederate Government for an account of his dealings in respect of a Confederate loan raised in Great Britain. It was held that the right of the United States to the property was derived only through succession to a public power. It was not a paramount right acquired by itself.<sup>81</sup>

The question of succession to obligations presents a more difficult problem. Authorities are not agreed as to the extent of succession to obligations in State succession.<sup>82</sup>

Two points, however, seem to be more or less established: that the liability to succession is greater where the obligation in question is correlative to a right which the succeeding State seeks to take over; and that the succeeding State is not liable for debts contracted for the purpose of waging war against itself. The first point has been decided by English courts in *U.S. v. Prioleau* (1865) and *U.S. v. McRae* (1869) (*supra*). The second point has received the support of such writers as Westlake and Keith.<sup>83</sup> The latter principle must be deemed to apply with even greater appropriateness to the case of a rebellion, since the rebels originally owed allegiance to the legitimate government and lending money to them for the purpose of rebellion incurs great responsibilities. Sir Robert Phillimore, in a reply to an inquiry whether it was advisable for the British Government to intervene on behalf of British subjects in claiming from the United States certain loans they had contracted with the Confederacy, gave the answer in the negative. It would be unfair, he thought, to burden the conqueror with an obligation which would be 'to defray the cost, not only of his own conquest, but of the resistance

<sup>80</sup> (1865) 2 H. & M. 564. Italics added.

<sup>81</sup> (1869) L.R. 8 Eq. 69.

<sup>82</sup> Hall (p. 123) thinks that there is a general succession. *Contra*, Keith, *Theory of State Succession*, 1907, Ch. VIII; *Oppenheim*, vol. I, s. 82; [Schwarzenberger points out that 'it would be an overstatement to assert that the (World) Court proclaimed the principle of general succession of the succeeding State into rights and duties of its predecessor' (*op. cit.*, n. 55, p. 22 above, p. 87).]

<sup>83</sup> Westlake, *International Law*, vol. I, pp. 75-83; Keith, *op. cit.*, p. 65.



of his enemy'.<sup>84</sup> The United States Government, however, went further. It refused to be bound by all the debts of the Confederacy, whether directly concerned with the war or not. The Anglo-American Mixed Claims Commission established under the Washington Treaty of 1871 decided that the United States were 'not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces'.<sup>85</sup>

Apart from these two special circumstances, the liability of a State for the obligations of its predecessor depends upon whether they are contractual or delictual in nature. It is generally held that the latter class of obligations do not pass.<sup>86</sup> As to contractual obligations, no general agreement can be adduced. Keith,<sup>87</sup> while acknowledging that there are a large number of writers, international treaties and political and judicial authorities in favour of the doctrine that the succeeding State steps into the civil liabilities of the extinct State, nevertheless maintains, upon the authority of *West Rand Central Gold Mining Co. v. The King* (1905)<sup>88</sup> and the British practice in connexion with the annexation of the South African Republics, that the acceptance of contractual obligations by the victor is a mere matter of expediency and good grace, and cannot be considered as a legal duty.

As the succession of a legitimate government to a suppressed rebel government partakes more of the character of a succession of States than that of governments (in view of the extinction of a separate entity), it is believed that the principles of State succession may, by analogy, be applied to such a situation. But to what extent such an analogy is relevant seems to depend upon the following considerations: the extent of authority exercised by the revolutionary body; the manner in which such authority is established; and the nature of the obligation incurred.

In considering how far the obligations incurred by a rebel

<sup>84</sup> Smith, vol. I, p. 412. It may be interesting to note that in the *Cuculla* case (1876) the U.S.-Mexican Claims Commission, instead of relying upon the ground that the debt was incurred for the expressed purpose of promoting the revolution, curiously enough took the more difficult line of arguing that the Zuloaga Government (which was recognised by most States, including the United States who later withdrew the recognition) was not a *de facto* government (Moore, *International Arbitrations*, vol. III, p. 2873).

<sup>85</sup> Moore, *Digest*, vol. I, s. 22; Moore, *International Arbitrations*, vol. I, pp. 684, 695, vol. III, pp. 2900-1, 2982-7.

<sup>86</sup> Oppenheim, vol. I, p. 156; Keith, *op. cit.*, Ch. VIII.

<sup>87</sup> Keith, *op. cit.*, pp. 66-72.

<sup>88</sup> [1905] 2 K.B. 391, 401.

body may be transmitted to the restored *de jure* government, it need hardly be emphasised that the discussions do not apply to a rebel body which later succeeds in establishing itself as the *de jure* government. For in this latter case, the personality of the rebel body merges, upon its ultimate success, with that of the State which it comes to represent.<sup>89</sup> For the present purpose, it is therefore only necessary to consider the case of unsuccessful revolutions.

Among unsuccessful revolutionary governments, a distinction must be drawn between a 'general *de facto* government' and a 'local *de facto* government'.<sup>90</sup> A general *de facto* government is one which has displaced the *de jure* government within the whole or practically the whole territory, such as, for example, the governments of Cromwell in England, of Murat in The Two Sicilies, and of Pierola in Peru (1879-1881). A local *de facto* government is one which controls only a portion of the national territory, such as the Confederate Government in the United States and the Maximilian Government in Mexico. A general *de facto* government may be an unconstitutional or unrecognised government, but it is *the* government of the State.<sup>91</sup>

With this latter class of *de facto* governments we are not immediately concerned, because, as soon as a revolutionary body has overcome the resistance of the *de jure* government, it becomes the only power in the field and instantly loses its character of a belligerent body. We shall therefore limit ourselves to the discussion of local *de facto* governments established by belligerent bodies.

Though a belligerent government may claim to represent the State or may aspire to become the representative of the State, yet, having authority over only a limited area, it cannot do so. Its acts cannot bind the State as a whole. In the *Sambiaggio Case* (1903) it was held by the Italian-Venezuelan Commission of 1903 that governments are not responsible for acts not under their control, because:

- '1. Revolutionists are not the agents of government, and a natural responsibility does not exist.

<sup>89</sup> See *Williams v. Bruffy* (1877), 96 U.S. 176, 186. See also Borchard, *op. cit.*, s. 96; Silvanie, *Responsibility of States for Acts of Insurgent Governments*, 33 A.J.I.L., 1939, pp. 78-90.

<sup>90</sup> See the distinction in *Williams v. Bruffy* (1877), 96 U.S. 176, 185-6.

<sup>91</sup> Borchard, *op. cit.*, pp. 206-7.

- '2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.
- '3. The revolutionists were beyond governmental control, and the Government cannot be held responsible for injuries committed by those who have escaped its restraints.' <sup>92</sup>

It appears that the reasons quoted above adduce a wrong argument for a correct conclusion. The revolutionists never claimed to represent the government; they claimed to represent the State. A better argument seems to be that, the insurgent government not being entitled to represent the State as a whole, the State cannot be held responsible for its acts so long as it has not itself spared any effort to provide protection to foreigners.<sup>93</sup> Such was probably in the minds of the United States and the Mexican Governments when they concluded the Convention of July 4, 1868, which stipulated that Mexico was responsible only for acts of the 'authority of the Mexican Republic'. In the numerous cases arbitrated under this Convention, it was held that Mexico was not responsible for the acts of the governments of Zuloaga, Canales, Miramon and Maximilian because they were never 'authorities of the Mexican Republic'.<sup>94</sup> The same principle was applied in the arbitrations between the United States and Spain.<sup>95</sup> In the *Baldwin Case* (1841),<sup>96</sup> however, Mexico was held responsible for the acts of the revolutionary Central Junta.<sup>97</sup> Here the tribunal seemed to have accepted the view that the

<sup>92</sup> Ralston, *Venezuelan Arbitration of 1903*, 1904, p. 680. See similar rulings in *Prats v. U.S.* by U.S.-Mexican Claims Commission of 1868 (Moore, *International Arbitrations*, vol. 3, p. 2886); the *Hanna Case* by British-American Claims Commission of 1871 (*ibid.*, p. 2982); the *Aroa Mines Case* by British-Venezuelan Commission of 1903 (Ralston, *op. cit.*, p. 350 *et seq.*); the *Jarvis Case* by U.S.-Venezuelan Commission of 1903 (*ibid.*, p. 145).

<sup>93</sup> See *Home Missionary Society Claim* (1920), Arbitration under the Agreement of 1910 between Britain and U.S., 15 A.J.I.L., 1921, p. 294. See also below, pp. 373-4.

<sup>94</sup> *McKenny Case* (1876) (Moore, *International Arbitrations*, vol. III, p. 2881); *Walsh Case* (*ibid.*, p. 2978); *Hugh Divine Case* (*ibid.*, p. 2980); *Schultz Case* (1871) (*ibid.*, p. 2973); *Baxter Case* (1871) (*ibid.*, p. 2934); *Jansen Case* (*ibid.*, p. 2902); *Wyman Case* (1876) (*ibid.*, p. 2978); *Silva Case* (1875) (*ibid.*, p. 2979); *Pope Case* (1851) (*ibid.*, p. 2972).

<sup>95</sup> *McGrady and Wilson Case* (1874) (*ibid.*, p. 2981); *Zaldivar Case* (1882) (*ibid.*, p. 2982).

<sup>96</sup> *Ibid.*, p. 2859.

<sup>97</sup> This has been criticised as recognising the responsibility of States for acts of local *de facto* governments. See Borchard, *op. cit.*, p. 211, n. 4; Lapradelle and Politis, *Recueil des Arbitrages Internationales*, 1905, vol. 1, pp. 466-7.

Junta was a part of the government which was responsible for its acts.

Between the years 1923 and 1927 the Government of Mexico entered into conventions with various powers<sup>98</sup> for the settlement of claims arising out of the political disturbances in Mexico between 1810 and 1920.

These conventions, however, did not establish the principle that the legitimate government is responsible for acts of insurgents, because it was expressly provided that the Mexican Government only accepted liability *ex gratia*, and not according to the ordinary principles of international law.<sup>99</sup>

The denial of liability by Mexico for acts of the Huerto régime in fact went further than the non-liability for acts of belligerent communities, for the Huerta régime, being in control of the capital and the greater part of the country between February, 1913, and July, 1914, and having been recognised *de jure* by many States, was really more than a local *de facto* government, and certainly not, as the Mexican government urged, no government at all.<sup>1</sup> This shows that, even if it be agreed that a State is only liable for acts of general *de facto* governments, there still remains the practical difficulty of distinguishing between a general *de facto* government and a local one.

It often happens that a political usurper might, by seizing control of the capital, assume the appearance of a general *de facto* government exercising authority throughout the country. But as soon as the first shock of surprise is over, rival factions might arise, and the usurper would either survive the struggle through the suppression of his rivals, or would be reduced to one of the several factions contending for supremacy. It would then be extremely difficult to say at what stage of the struggle a transition takes place by which the government of the usurper is changed from a general to a local character. For example, the

<sup>98</sup> With the United States on September 10, 1923; with France, September 25, 1924; with Germany, March 16, 1925; with Great Britain, November 9, 1926; with Italy, January 13, 1927; with Spain, November 25, 1925 (Feller, *Mexican Claims Commissions, 1923-34, 1935, Appendices II-VII*).

<sup>99</sup> U.S.-Mexican Convention, Article II (2) and corresponding provisions in other conventions. In the interpretation of the conventions, Mexico placed further limitations upon the scope of her liability. These were conceded by the other Powers. See Feller, *op. cit.*, s. 150.

<sup>1</sup> *Ibid.* Decision No. 1, U.S. Special Mexican Commission, 32 A.J.I.L., 1938, p. 858; *Hopkins Case* (1926), *Opinions of the Commissioners*, 1927, p. 42.

military government set up by General Zuloaga in Mexico in 1851, which was recognised by the entire diplomatic corps, had all the characteristics of a general *de facto* government. There did not seem to be any opposition government in existence in Mexico until the establishment of Juárez's Government at Vera Cruz. However, in the *Cuculla Case*,<sup>2</sup> the United States-Mexican Mixed Claims Commission denied that the Zuloaga Government was a government at all. It is true that the Zuloaga Government did not continue to be the general *de facto* government after the rise of the Juárez government which claimed to be *de jure* and was recognised by foreign powers as such, but it could not, nevertheless, be denied that the government had at one time been the general *de facto* government. It seems that the real question was in determining the exact point of time at which the transition from a general *de facto* government to a local one took place.

The *Hopkins Claim* (1926)<sup>3</sup> decided by the United States-Mexican Claims Commission seems to have provided an answer to this question. It was suggested by the Commission that a distinction should be drawn between two methods by which the revolutionary body seizes power. A revolutionary body which seizes power at the centre becomes a general *de facto* government and continues to be such so long as it has 'real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people'. On the other hand, the revolutionary body which strikes from without can only become a local *de facto* government until it has finally succeeded in establishing itself throughout the country.<sup>4</sup>

The third factor to be considered in the determination of State responsibility is the nature of the obligation incurred. The administration of a modern State has opened into an ever-widening sphere of non-political quasi-commercial public services and government activities. Such activities of the government are so bound up with the everyday life of the community that they must not be interrupted, and are, in fact, generally not interrupted, even during violent political upheavals. Under these circumstances, to rule out the validity of every act of a local *de facto*

<sup>2</sup> Moore, *op. cit.*, vol. III, p. 2873.

<sup>3</sup> *Opinions of the Commissioners*, 1927, p. 42; Green, *op. cit.*, n. 7, p. 141 above, No. 144.

<sup>4</sup> *Ibid.*, p. 48.

government, on the ground that it cannot represent the State, would appear to be too simple a solution for problems arising out of a complicated society.

This categorical manner in disposing of the question was criticised by the United States-Mexican Claims Commission in the *Hopkins Case*. It was urged by the Commission that, in order to determine the validity of acts of local *de facto* governments, the character of each transaction must be judged and determined by the facts of the particular case. Some acts are 'impersonal acts of the government itself as an abstract entity', unaffected by the character of the ruler. In the instant case, the purchase of postal money orders was found to fall within the category of purely government routine having no connexion with the individuals administering the government for the time being; and was binding upon the Mexican State. This decision was followed by many other money orders cases decided by the same Commission.<sup>5</sup> The principle also applied to ordinary commercial contracts for the purchase and sale of goods between government bureaux under the Huerta administration and foreign citizens.<sup>6</sup>

In the *Hopkins Case*, in which the distinction between 'personal' and 'impersonal' acts of government was made for the first time, it appears, ironically, that such a distinction was not necessary for the decision of the case. Having established the fact that the Huerta administration was paramount at the time of the act in question,<sup>7</sup> all its acts, whether personal or impersonal, would have been equally binding upon the State.<sup>8</sup> The distinction itself is, nevertheless, of great value from the doctrinal point of view. It would enable rights of individuals to be protected according to their merits, and not to be affected by whatever storms might arise on the political horizon. It brings the facts into harmony with legal logic.

Another test for the validity of acts of insurgent governments was suggested in the *Hopkins Case*, and has been applied in other cases. It was suggested that where a State 'receives benefits from transactions of an unusual nature', such transactions must be binding upon the State.<sup>9</sup> Bonds issued by Huerta for payment

<sup>5</sup> See cases cited in Silvanie, *loc. cit.*, n. 89, p. 327 above, p. 98.

<sup>6</sup> *Ibid.*, pp. 98-9.

<sup>7</sup> *Opinions of the Commissioners*, 1927, pp. 43, 48-9.

<sup>8</sup> *Ibid.*, p. 48.

<sup>9</sup> *Ibid.*

of interest on a pre-existing debt of Mexico were accepted as valid by the subsequent Mexican Government while other bonds were repudiated. This case was cited by the Commission as evidence of the recognition of the principle by the Mexican Government.<sup>10</sup>

A similar conclusion was reached by the British-Mexican Claims Commission under the convention of 1926 in the case of the *British Shareholders of the Mariposa Company*.<sup>11</sup> It was held that Mexico was responsible for cattle taken by the Villista troops from the claimant company's ranch in order to supply meat to the population of the town.

From the above discussion, the position seems to be that the obligations incurred by a local *de facto* government do not as a rule devolve upon the State,<sup>12</sup> except where the obligation arises from impersonal acts, or from acts from which the State receives special benefits.

But upon what grounds does the State accept these obligations? It cannot be maintained that the local *de facto* government, while not representing the State in other matters, can act to bind the State in these exceptional cases. It seems to the present writer that the explanation can only be found in the theory of State succession. Although writers are not agreed as to whether a successor State should succeed to all the obligations of its predecessor, they are, however, generally agreed that at least certain classes of obligations devolve upon the successor.<sup>13</sup> It may be said that the two exceptional cases mentioned above should come under these transmissible obligations. The obligations are not incurred by the restored legitimate government through its own action, but are taken over from an entity whose existence has been terminated.

<sup>10</sup> *Opinions of Commissioners*, 1927, p. 46.

<sup>11</sup> Silvanie, *loc. cit.*, pp. 101-2 (British-Mexican Claims Commission of 1926, *Decisions and Opinions*, 1933, p. 304).

<sup>12</sup> Cf. below, p. 373.

<sup>13</sup> See Schwarzenberger, *op. cit.*, n. 55, p. 22 above, p. 80 *et seq.*

## CHAPTER 21

### THE NATURE OF THE RECOGNITION OF BELLIGERENCY

IN our previous discussion with regard to belligerent communities, we have referred only to those whose right of belligerency is assumed to have been established. Political uprisings may vary in the degree of success and stability from a mob riot to a full-fledged civil war.<sup>1</sup> Only when the uprising has attained a certain degree of development can the revolting community acquire the dignity of a 'belligerent community' and be in the position to exercise certain of the functions normally appertaining to an independent State. What is this degree of development which qualifies rebellious individuals to become a belligerent community? How is it determined? What is the nature of the recognition of belligerency? Who is entitled to grant recognition? Under what circumstances may recognition be granted? Is the grant of recognition a duty or a discretionary right?

Let us first consider the question of the nature of recognition. The opinions with regard to the nature of the recognition of belligerency roughly fall into two groups, corresponding to the constitutive and the declaratory schools in the question of State recognition. One school conceives of an act of recognition as a grant or a concession of rights, privileges or legal status; the other conceives of it merely as a declaration or acknowledgment of the existence of certain facts. To the former, an insurgent body enjoys no right and is subject to no duty under international law until recognised. To the latter, the existence of a civil war is a fact, from which flow the rights and duties of belligerents and neutrals. Recognition by the parent State or by a foreign State, according to this view, adds nothing to these rights and duties, nor does the refusal to recognise lessen them. It merely indicates that the parent State or the foreign State concerned acknowledges the existence of that fact and intends to accept its consequences.

<sup>1</sup> For various gradations of civil uprisings, see below, p. 398.



The 'concession theory' receives the support of numerous writers on international law.<sup>2</sup> The authority in the practice of nations in support of this view is, however, by way of contrast, remarkably meagre. An opinion of the British law officers regarding the Cretan insurrection of 1867 may perhaps be cited as lending weight to that theory. It was stated that if the insurgents were to be 'treated as a Belligerent *de facto*', they would be entitled to the rights of war.<sup>3</sup> *The Ambrose Light* (1885),<sup>4</sup> decided by the District Court of the Southern District of New York, is perhaps the only judicial authority in full support of the concession theory. *The Ambrose Light*, a vessel belonging to the insurgent party in rebellion against the Government of Colombia, was captured by an American gunboat in the Caribbean Sea. The vessel had instructions to attack Colombian ships and to engage in a hostile expedition against Cartagena, but no other depredations were intended. The Court, condemning the ship, declared: 'International Law has no place for rebellion; and insurgents have strictly no legal rights, as against other nations, until recognition of belligerent rights is accorded them'.<sup>5</sup> The exploit of the ship was denounced as an attack on the rights of all mankind which should be suppressed at the discretion of every nation. Without this right of self-defence, it was stated, the 'whole significance and importance of the doctrine of recognition of belligerency would be gone, since the absence of recognition could be safely disregarded; the distinction between lawful and unlawful war would be practically abolished; and the most unworthy revolt would have the same immunities for acts of violence on the high seas, without any recognition of belligerent rights, as the most justifiable revolt would have with it'.<sup>6</sup>

<sup>2</sup> For example: Hall, p. 36; Oppenheim, vol. II, ss. 59, 75, 76; Hyde, vol. I, s. 47; Fauchille, *op. cit.*, n. 24, p. 15 above, vol. I, Pt. I, s. 200; Hershey, *op. cit.*, n. 15, p. 306 above, s. 115-9; Woolsey, *op. cit.*, n. 2, p. 105 above, p. 302; Lawrence, *op. cit.*, n. 5, p. 14 above, p. 328; Erich, *loc. cit.*, n. 21, p. 15 above, p. 460; Rougier, *op. cit.*, n. 2, p. 97 above, p. 197.

The concession theory should not be identified with the constitutive theory, as the former is also held by many writers of the declaratory school. It may be noted that Professor Lauterpacht, although he regards recognition as constitutive of rights, however, differs from this school by his insistence upon the duty of recognition. See below, p. 356.

<sup>3</sup> Opinion of August 14, 1867 (Smith, vol. I, p. 265).

<sup>4</sup> (1885) 25 F. 408, Hudson, p. 187.

<sup>5</sup> *Ibid.*, p. 190.

<sup>6</sup> *Ibid.*

The judgment has been subjected to much criticism.<sup>7</sup> It is not believed that today anybody would seriously entertain the idea that unrecognised insurgents are enemies of mankind or that a distinction can justly be drawn between 'unworthy' and 'justifiable' revolts. The more general view is now to regard ships of even unrecognised insurgents as non-piratical.<sup>8</sup> Their right to attack the enemy is derived from the fact of the existence of open warfare.

The proper stand for a foreign State to take in case of domestic disturbance within another State can be none other than that of disinterestedness and non-intervention. It has no right either to aid or to suppress the rebellion.<sup>9</sup> The treatment to be accorded to insurgents by foreign States should be such as to correspond with the actual state of the development of the revolution. If facts are such that an open war is actually in existence, it would not be right for a foreign State, to use the words of Westlake, to 'shut its eyes to the fact of there being a real war' and 'to treat combatants as rioters and pirates'.<sup>10</sup>

This attitude is in consonance with the declaratory doctrine of the recognition of belligerency. According to that doctrine, belligerency is a status derived from certain conditions of facts. The act of recognition by the established government or foreign States is nothing more than a declaration on their part that such facts have been known to them and that they intend to accept the rights and duties which may arise in consequence of such a state of facts. In the absence of an international organ to pronounce upon the existence of such a state of facts, the judgment must necessarily be left to the individual States. But a foreign State, once admitting that the fact of war exists, would no longer be

<sup>7</sup> See criticism of Wharton, on the ground of non-intervention (*Insurgents as Belligerents*, 33 Albany L.J., 1886, p. 125, partially reprinted in Moore, *Digest*, vol. II, pp. 1104-5); Dickinson, *loc. cit.*, n. 20, p. 138 above, p. 120.

<sup>8</sup> Below, p. 402 *et seq.*

<sup>9</sup> See Article 2 of the Resolution of the Institute of International Law, 1900, on 'Rights and Duties of Foreign Powers as Regards the Established and Recognised Governments in Case of Insurrection', which provides for the duty of non-intervention (Scott, *Resolutions of the Institute of International Law*, 1916, p. 157). See also, Article 2 of the Convention of Havana, February 20, 1928, regarding 'Rights and Duties of States in Case of Civil Strife', which provides that foreign States are not bound by the declaration of piracy issued by the established government (Hudson, *International Legislation*, vol. 4, p. 2416).

<sup>10</sup> Westlake, *op. cit.*, vol. I, p. 53.

free to decide for itself whether to accept or to refuse the duties of neutrality.<sup>11</sup> Mr. Eden, British Foreign Secretary, admitted in the House of Commons on April 13, 1938, that had it not been for the presence of very exceptional circumstances in the Spanish Civil War, 'every precedent would be in favour of granting belligerent rights as was done in the American Civil War'.<sup>12</sup>

This kind of admission would not have been possible if the British Government had acted entirely upon the concession theory, because under that theory the contesting parties would have no right against Great Britain unless and until she had granted to them such rights.

The declaratory theory of recognition is a corollary of the right of rebellion, which, in terms of international law, is the right of every nation to choose its own form of government.<sup>13</sup> Grotius admits that such a right of rebellion should be allowed in case of 'extreme and unavoidable necessity'.<sup>14</sup> Christian Wolff goes further and maintains that by nature the right of war belongs to every man against one who does not wish to allow him his perfect right.<sup>15</sup> 'When the nation is divided into two absolutely independent parties, who acknowledge no common superior', writes Vattel, 'the State is broken up and the war between the two parties falls, in all respects, into the class of a public war between two different nations.'<sup>16</sup> Likewise, Bluntschli argues that a belligerent community is in a measure a State, and should be accorded the quality of a belligerent.<sup>17</sup> Dana, in formulating the conditions for recognition, says: 'It is certain that the state of things between the parent state and insurgents must amount, in fact, to a war, *in the sense of international law*, that is, powers and rights of war must be in actual exercise.'<sup>18</sup> Obviously he does not think that any act of recognition is required to put the war in an international law plane. Rather, the recognition can only take place, *after* the belligerent status has been asserted by the parties.

<sup>11</sup> Lauterpacht, p. 186.

<sup>12</sup> Parl. Deb., H.C., 5th ser., vol. 325, col. 1608. See similar pronouncements by the British Government on various occasions, Lauterpacht, p. 252, n. 2.

<sup>13</sup> See Lauterpacht, pp. 229-30, 233.

<sup>14</sup> Grotius, Bk. 1, Ch. IV, XX.

<sup>15</sup> Wolff, *Jus Gentium*, 1764, ss. 613, 1010-2.

<sup>16</sup> Vattel, *op. cit.*, n. 10, p. 14 above, Bk. III, ch. 18, § 295.

<sup>17</sup> Bluntschli, *op. cit.*, n. 10, p. 14 above, s. 512, n. 1.

<sup>18</sup> *Dana's Wheaton*, s. 23, n. 15. But see *ibid.*, for his view regarding the necessity of recognition.

The same view is held by Calvo, who says that 'the existence of the civil war confers belligerent rights on the parties'.<sup>19</sup>

It is pointed out by W. L. Walker, that, in all the works he could find written prior to 1865, nowhere was the term 'recognition of belligerency' mentioned and that there was no indication in the opinions of writers or statesmen in the early half of the nineteenth century that any decided line of distinction could be drawn between recognised and unrecognised belligerents.<sup>20</sup>

There was no formal recognition of belligerency during the American War of Independence. The attitude of the European Powers varied from the prompt acknowledgment of independence (such as that by France and Spain) to the release of American prizes by Denmark.<sup>21</sup> In no case, however, was there any evidence that the governments concerned had acted in accordance with the doctrine that the revolting colonies had no rights until recognised. In the controversy with Denmark, the United States held the view that, in the event of a civil war in a State, foreign States should, 'while remaining passive, allowing (allow) to both the contending parties all the rights which public war gives to independent sovereigns'.<sup>22</sup>

The revolt of the Spanish Colonies in America also bore out Mr. Walker's conclusion. Rights of belligerency were gradually exercised by the insurgents and acquiesced in by foreign States, in particular, Great Britain and the United States, according to the actual development of the war, without creating a status by one single action. The problem of the legal capacity of insurgents was at that time argued more on the ground of the recognition of independence rather than on that of belligerent recognition. The British policy was at first handicapped by the Treaty of 1814 with Spain,<sup>23</sup> in which she pledged herself to prevent arms and ammunition from reaching Spanish provinces in America. But gradually, in the course of the conflict, she allowed more and more scope to the belligerent activities of the

<sup>19</sup> Calvo, *Le Droit International, Théorique et Pratique*, 1896, vol. 4, p. 25. See also P. A. Landon, letter to *The Times*, August 30, 1937.

<sup>20</sup> Walker, *loc. cit.*, n. 19, p. 312 above, pp. 178-9.

<sup>21</sup> Moore, *Digest*, vol. I, pp. 168-9. See also *Bergen Prizes* (1779), n. 98, p. 54 above.

<sup>22</sup> Cited in O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 A.J.I.L., 1937, p. 398, at p. 405.

<sup>23</sup> 1 (ii) B.F.S.P., 1812-4, p. 292.

insurgents. In February, 1817, Sir C. Robinson recommended a distinction between insurgent ships and pirates and the submission to the jurisdiction of insurgent courts as regards British interests on board Spanish ships.<sup>24</sup>

In January, 1815, British naval officers were instructed to assume a neutral attitude, to refrain from hostilities with insurgent cruisers, and to respect 'local regulations' in insurgent ports. At the same time, however, British ships were told to protect lawful trade and the property of British subjects.<sup>25</sup> In 1819 the Foreign Enlistment Act was passed.<sup>26</sup> In July, 1819, the British Government decided to place Spain upon the same footing with her colonies in matters of the export of munitions from Great Britain. A year later, Robinson advised that insurgents ought to be allowed to institute blockades.<sup>27</sup> On September 14, 1822, writing with reference to the condemnation of ships by Peruvian authorities, he declared: 'Considering the principles of neutrality that have been professed on the part of this country, the asserted independent governments would have a right to exercise the ordinary privileges of war in maritime capture.'<sup>28</sup> At that time the British Government had not even informally recognised the belligerency of the South American Colonies.<sup>29</sup> It seems that the insurgents could be allowed to exercise the right of maritime capture, even without recognition. If that much right were allowed, it is difficult to see what else an act of recognition can add to the legal capacity of an insurgent body.

The practice of the United States during this period proceeded along a similar line. Reviewing the policy of this period, President Monroe came to the following conclusion:

'Through every stage of the conflict the United States has maintained an impartial neutrality, giving aid to neither of the parties in men, money, ships or munitions of war. They have regarded the contest not in the light of an ordinary insurrection

<sup>24</sup> Smith, vol. I, p. 270.

<sup>25</sup> *Ibid.*, pp. 268-70.

<sup>26</sup> 59 Geo. III, c. 69.

<sup>27</sup> Opinion of October 20, 1820, Smith, vol. I, p. 278.

<sup>28</sup> *Ibid.*, p. 279.

<sup>29</sup> British recognition was granted on February 21, 1823, by allowing free export of munitions to both parties (*ibid.*, p. 279). See, for the view that there was no single act of recognition, Lauterpacht, p. 180, n. 1.

or rebellion but as a civil war between parties nearly equal, having as to neutral powers equal rights.'<sup>30</sup>

The American proclamation of neutrality was issued at a comparatively early stage of the contest (on September 1, 1815).<sup>31</sup> Consequently, it makes it more difficult to discover what attitude the United States had adopted towards the insurgents prior to that act. It is, however, known that there was a presumption in favour of the non-piratical character of insurgent ships, which were allowed to enter American ports, and there was no prohibition against normal trade with insurgent countries, although military expeditions were disallowed.<sup>32</sup>

In his message of March 8, 1822, President Monroe made a further statement on the principles underlying the American policy. He said:

'As soon as the (revolutionary) movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to them. . . . Through the whole of this contest the United States have remained neutral, and have fulfilled with the utmost impartiality all the obligations incident to that character.'<sup>33</sup>

It is obvious from this statement that the rights of the insurgents as equal parties to a civil war were regarded as rights to which they were entitled through the operation of the law of nations and not through the creation by or concession of other States. Such is the view of the United States Supreme Court in *The Santissima Trinidad* (1822), in which it was held 'that the existence of this civil war (between Spain and her Colonies) gave to both parties all the rights of war against each other'.<sup>34</sup>

The practice of nations was again put to the test during the Greek rebellion which began in April, 1821. No formal recognition of belligerency was made by the British Government until the proclamation of neutrality on June 6, 1823.<sup>35</sup> Yet from an early stage of the conflict Great Britain had assumed a position

<sup>30</sup> Message to Congress, December 2, 1817 (Moore, *Digest*, vol. I, p. 173).

<sup>31</sup> *Ibid.*, p. 171. See divergencies in the date of the American recognition, Lauterpacht, p. 182, n. 1.

<sup>32</sup> Moore, *Digest*, vol. I, pp. 170-1.

<sup>33</sup> *Ibid.*, pp. 174-5.

<sup>34</sup> (1822) 7 Wheat. 283, 306.

<sup>35</sup> Professor Lauterpacht thinks that the recognition did not take place until the end of 1824 (p. 178).

not unlike that of a neutral. In September, 1821, an application for permission to arm and equip a Turkish frigate was refused on the ground that 'it would not be consistent with the Duties of Neutrality'.<sup>36</sup> In an opinion of October 4, 1821, Robinson advised that interposition against the insurgents' ships should be 'by all amicable means'.<sup>37</sup> On January 27, 1823, the British merchants were informed that they must not expect the protection of the navy in forcing the blockade instituted by the rebels.<sup>38</sup>

It may be argued that the neutral attitude of Great Britain, instead of originating from the belief that the Greek insurgents were entitled to belligerent rights independently of recognition, was the consequence of a proclamation of neutrality on June 7, 1821, by the Ionian Senate, which should be regarded as constituting a qualified recognition of belligerency by Great Britain.<sup>39</sup> This argument was definitely disproved by a despatch of Mr. Canning, in which he declared:

'The Proclamation of the Ionian Government . . . is *not any new declaration of neutrality* on our part. We have openly and uniformly, from the time when the Greek struggle assumed the shape of a regular contest on the sea, professed an impartial neutrality between the two *belligerent* parties, having allowed to each the free exercise of belligerent rights, such as the Law of Nations warrants. . . .'<sup>40</sup>

He severely criticised Metternich's doctrine that 'the Greeks, as *rebels*, are not entitled to the same rights of war, as legitimate belligerents', saying that it is not possible to expect the insurgents to discharge the duties of civilised warfare without according them corresponding rights.<sup>41</sup>

The foregoing account of British practice clearly shows that, even without any overt act, such as the proclamation of June 6, 1823, or the Ionian proclamation of June 7, 1821, the British Government had accepted the fact of the war and the obligations of a neutral. Such an attitude is in strict agreement with the declaratory theory. It was no wonder that Dr. Lushington, think-

<sup>36</sup> Smith, vol. I, pp. 283-4.

<sup>37</sup> *Ibid.*, p. 284.

<sup>38</sup> *Ibid.*, pp. 286-7.

<sup>39</sup> *Ibid.*, p. 282.

<sup>40</sup> Canning to Wellesley, December 31, 1824 (*ibid.*, p. 295) (*italics added*).

<sup>41</sup> *Ibid.*, p. 296.

ing in terms of the concession theory, should find it difficult to explain why the British Government should have taken upon itself the obligation of neutrality with regard to such unrecognised insurgents who had 'legally' no right to establish blockades.<sup>42</sup>

The British practice outlined above seems to have been followed with consistency during later civil wars. Jenner (King's Advocate) advised the acknowledgment of the blockade instituted by the Miguelists in Spain in 1828.<sup>43</sup> In 1848 Great Britain recognised the blockade of Trieste by Sardinia and Venice, which were in revolt against Austria.<sup>44</sup> In 1891, while not recognising the belligerency of Chilean insurgents, the British Government, nevertheless, allowed them to exercise certain rights of war, including the institution of a blockade.<sup>45</sup> Numerous other instances in which the belligerent right of blockade of the insurgents were admitted by the British Government, are mentioned in Professor Lauterpacht's *Recognition in International Law*.<sup>46</sup> Only on the occasion of the revolt of St. Domingo against Spain in 1864 did the British Government, to the despair of the Law Officers, persist in ignoring the existence of the state of war. The correct view was urged by the Law Officers in their Opinion of August 22, 1864, which declared that the existence of war is a question of fact, as well as law. They argued:

'If the facts are such, as really to constitute a state of war between the contending parties, according to the law of nations, it is not, we think, competent, by law, to any neutral power, to withdraw its ships and subjects upon the high seas, from the operation of the ordinary laws incident to that state of things, merely by declining to acknowledge its existence.'<sup>47</sup>

In the United States, too, we find the same line of conduct pursued with equal consistency. Hospitality was extended to vessels of Texan insurgents against Mexico in 1836.<sup>48</sup> In 1845 a naval officer was punished for failure to respect the belligerent rights of General Oribe, who was engaged in a civil war in the

<sup>42</sup> Opinion of May 29, 1823 (*ibid.*, pp. 291-3).

<sup>43</sup> Opinion of August 13, 1828 (*ibid.*, p. 299), which was a reversal of a view held two months before (Opinion of June 10, *ibid.*, p. 298).

<sup>44</sup> *Ibid.*, p. 300.

<sup>45</sup> Moore, *Digest*, vol. 2, pp. 1107-12.

<sup>46</sup> Lauterpacht, p. 180.

<sup>47</sup> Smith, vol. I, p. 314. The advice was not acted upon (*ibid.*, p. 320).

<sup>48</sup> Moore, *Digest*, vol. I, pp. 176-7.



Oriental Republic of Uruguay.<sup>49</sup> In a communication<sup>50</sup> to the Peruvian Minister with reference to the Vivanco insurrection in Peru, Secretary Cass maintained in 1858 that the factual circumstances of the contest made that contest a civil war. He did not think that any public act or proclamation was necessary before the consequences of civil war might follow. In a despatch to Mr. Clay in Peru he rejected the argument put forward by the Peruvian Minister, that a civil war in one country cannot be known to the people of another save through their own government; that the existence or non-existence of civil war is a question, not of fact, but of law, which no private person has the right to decide for himself; that foreigners must regard the former state of things as still existing, unless their respective governments have recognised the change. In pointing out the absurdity of this contention, he argued that the existence of a state of civil war can and must be judged by the individual upon the evidence of his own senses. It would be folly for him to ignore the actualities of fact while waiting for the solution of a legal problem at home.<sup>51</sup>

A departure from this general principle occurred during an insurrection in Mexico, 1860. The United States decided not to respect any blockade instituted by the Miramon faction.<sup>52</sup>

The American Civil War has often been spoken of as the period in which the law of belligerent recognition attained its maturity.<sup>53</sup> The controversy between the United States and Great Britain was responsible, more than anything else, for bringing the question of recognition of belligerency to such prominence. Oddly enough, however, the point under discussion here—whether the existence of a civil war is a matter of fact or the result of recognition—did not seem to be a matter of disagreement between the contending parties. Both sides were agreed that recognition

<sup>49</sup> Moore, *Digest*, vol. I, pp. 178-82.

<sup>50</sup> See below, p. 383.

<sup>51</sup> Cass to Clay, November 26, 1858 (Moore, *Digest*, vol. I, p. 184. [See, in this connexion, the case of *David Colden* (1862), in which the Claims Commission between Costa Rica and the United States of America pointed out that 'whatever may have been the language adopted by Costa Rica in regard to Nicaragua, Rivas-Walker and the filibusters, the fact, which is more eloquent than words, shows that it was a public war . . .' (Moore, *International Arbitrations*, vol. 2, p. 1560, at p. 1561).]

<sup>52</sup> Cass to Toucey, March 10, 1860 (*ibid.*). An American warship actually captured ships co-operating with the insurgents in Mexican waters (McLane to Cass, March 30, 1860, Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs, 1831-1860*, vol. 9, 1937, p. 1170).

<sup>53</sup> See Lauterpacht, p. 184.

is recognition of a fact. The question in dispute was one of the correct appreciation of the fact and the correct timing of the recognition, rather than the nature of the recognition.<sup>54</sup> In taking this position, it was necessary that both governments should accept the proposition that the rights of war and neutrality are derived from the existence of the war, and not from the action of any State. The following words of Lord Russell and Secretary Fish no doubt express this point of view. In a letter to Lord Lyons Lord Russell wrote: 'Her Majesty's Government affirm, as the United States affirmed in the case of the South American provinces, that the existence of this civil war gives to both parties the rights of war against each other.'<sup>55</sup> Likewise, Secretary of State Fish declared: '... national belligerency, indeed, like national independence, being but an existing fact, officially recognised as such, without which such a declaration is only the indirect manifestation of a particular line of policy.'<sup>56</sup>

More than once, the United States Supreme Court had occasion to declare its view that civil war is a fact, requiring no recognition. In *The Prize Cases* (1862) it declared:

'A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organisation of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organised armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.'<sup>57</sup>

As to the function of recognition, the Court declared itself in favour of the declaratory view, saying:

'What recognition does is not to operate as a grant of rights

<sup>54</sup> See Phillimore, *op. cit.*, n. 21, p. 15 above, vol. 2, pp. 24, 26. The main point of disagreement was whether the fact of civil war did exist at the time of British recognition. Adams argued that the fact of civil war does not include 'appearances or presumptions', while Lord Russell argued that such 'facts' should include the antecedent history, and the certainty of the magnitude of the war. See *Dand's Wheaton*, s. 23, n. 15. Seward even went so far as to argue that there was no war until the rebels succeeded in establishing their independence. The inadmissibility of this argument is pointed out by Bernard, who says that, in this sense, there could never be a 'civil' war (*op. cit.*, n. 12, p. 107 above, pp. 160-1). See also below, p. 376.

<sup>55</sup> Letter of July 19, 1861 (51 B.F.S.P., 1860-1861, p. 206).

<sup>56</sup> Fish to Motley, September 25, 1869 (Moore, *Digest*, vol. I, p. 193).

<sup>57</sup> 2 Black 635, at p. 666-7.

of war, but create at the most a species of estoppel. The neutral State estops itself from denying that a true war exists.’<sup>58</sup>

The view was reiterated in other civil war cases.<sup>59</sup> The argument was even more strongly put by Commissioner Wadsworth who delivered the opinion of the United States-Mexican Mixed Claims Commission in the case of *Prats v. United States*.<sup>60</sup> Prats, a citizen of Mexico, claimed damages for the burning of some bales of cotton by the Confederate forces. Neither the United States nor Mexico had ever recognised the belligerency of the Confederate States. The award is an excellent exposition of the declaratory theory and is worth quoting at length:

‘Non-responsibility on the part of the United States for injuries by the Confederate enemy within the territories of that government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers’ sovereign. It resulted from the *fact* of belligerency itself, and whether recognised or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and, so to speak, an *estoppel* as to that government. This, probably, is all Mr. Adams meant in his dispatch to Mr. Seward (quoted in an argument, June 11, 1861, *Diplomatic Correspondence*, 105). If responsibility on the part of the United States in the absence of such recognition is intimated, we do not concur with that distinguished minister, for had Great Britain never recognised the Confederates as belligerents at all, the consequences of the state of war as a fact to Great Britain, as to all other neutral powers, would have been the same; such as the liability of their vessels on the high seas to search and seizure as prize by the armed cruisers of the United States, and to capture for attempts to violate the blockade. These rights the United States exercised against Mexico and all other nations, and did it in virtue of the fact of war, and not because of the recognition of the belligerency of the insurgents by those powers or any of them. Mexico conceded to the United States the exercise of these rights of war against her, and is equally estopped now with other nations to

<sup>58</sup> At p. 665. See also Schwarzenberger, *op. cit.*, n. 55, p. 22 above, p. 62.

<sup>59</sup> *Williams v. Bruffy* (1877), 96 U.S. 176, 189; *U.S. v. Pacific Railroad* (1887), 120 U.S. 227, 233. In some other cases, however, the belligerent rights were held to be conceded for humanitarian reasons, for instance, *Thorington v. Smith* (1868), 8 Wall. 1; *Ford v. Surget* (1878), 97 U.S. 594.

<sup>60</sup> Decided under the U.S.-Mexican Convention of July 4, 1868 (Moore, *International Arbitrations*, vol. 3, pp. 2886-2900).

deny the *fact* or to ignore the changes which the war introduced into the relations between the two governments.’<sup>61</sup>

This case is comparable to the *Tinoco Concessions* Arbitration (1923) between Great Britain and Costa Rica<sup>62</sup> with regard to the recognition of governments, in which the same underlying principles were upheld. In both cases it was held that the mere failure to recognise a state of facts which actually existed does not preclude a State from claiming rights arising out of that state of facts. In the *Prats Case*, even if the United States had denied the existence of the civil war (which the tribunal found that she had not) she would not have been estopped from claiming the non-responsibility to which a condition of civil war entitled her. On the other hand, it was irrelevant whether Mexico had recognised the belligerency of the insurgents or whether she had conceded the exercise of belligerent rights to the United States in absence of that recognition; so long as the civil war existed as a fact, she was not entitled to hold the United States responsible for the acts of the insurgents.

The theory that the rights of a belligerent community are derived, not from recognition, but from the fact of war again received strong affirmation from the United States-Mexican Claims Commission in the case of the *Oriental Navigation Company* (1928).<sup>63</sup> Mexico sought to enforce a decree closing an insurgent port, and defended her action on the ground, *inter alia*, that the insurgents had not been recognised by any foreign power. The Commission rejected this argument, holding that ‘in time of civil war when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously by a long series of authorities, that international law will apply and that neutral trade is protected by rules similar to those obtaining in case of war’.<sup>64</sup> The American Commissioner emphatically declared:

‘I do not think there is any distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognised by some affirmative act and a

<sup>61</sup> Moore, *International Arbitrations*, vol. 3, pp. 2888-9. See also *Underhill v. Hernandez* (1897), 168 U.S. 250, 255, quoted below, p. 393.

<sup>62</sup> 1 *Reports of International Arbitral Awards*, p. 369.

<sup>63</sup> *Opinions of Commissioners*, 1929, p. 23; 23 A.J.I.L., 1929, p. 434; De Beus, *Jurisprudence of the General Claims Commission*, 1938, pp. 281-94.

<sup>64</sup> *Opinions of Commissioners*, 1929, p. 24; 23 A.J.I.L., 1929, p. 435; De Beus, *op. cit.*, pp. 282-3.

port occupied by insurgents to whom that status has not been accorded in that manner.’<sup>65</sup>

It is strictly true that in the American practice there have been numerous cases in which recognition of belligerency was refused. But these do not necessarily demonstrate the prevalence of the contrary practice. In some cases, the refusal was justifiable, as in the case of the Cuban rebellion of 1868-1878, where the insurgents possessed no civil government.<sup>66</sup> In some other cases, the facts were not very clear whether recognition was accorded or refused.<sup>67</sup> In still other cases, the ground for non-recognition was entirely unsupportable.<sup>68</sup> In most cases of non-recognition, the action of the Government created confusion in the legal situation.<sup>69</sup> These cases merely demonstrate the soundness of the dominant practice and the unfortunate consequences of any departure from it.<sup>70</sup>

The Spanish Civil War, 1936-1939, is indubitably the most disputed case of belligerent recognition since the American Civil War. It contained certain features of anomaly deserving special attention. The events were briefly as follows.<sup>71</sup> The revolt broke out in the middle of July, 1936, and rapidly spread over large areas of the country. On August 8, 1936, the Tangier Committee, which was composed of the principal foreign consuls, decided that warships of both parties should be excluded from the harbour. It decided further that passports bearing visas of

<sup>65</sup> *Opinions of Commissioners*, 1929, p. 43; De Beus, *op. cit.*, p. 284.

<sup>66</sup> See President Grant's Messages of December 6, 1869, June 13, 1870, and December 7, 1875 (Moore, *Digest*, vol. I, pp. 193-7).

<sup>67</sup> See *The Ambrose Light* (1882) and *The Conserva* (1889), above, p. 233.

<sup>68</sup> For instance, one of the reasons for the non-recognition of the Cuban rebellion in 1895-1898 was the inconveniences of neutral duties. See President McKinley's Message of December 6, 1897 (Moore, *Digest*, vol. I, pp. 198-200).

<sup>69</sup> During the Brazilian naval revolt of 1893, foreign Powers insisted upon naval protection of their rights in Brazilian territorial waters, and threatened to treat as piratical the seizure of contraband articles within such waters (*ibid.*, pp. 202-4). On the other hand, the United States were prepared to accept the validity of the insurgent blockade, if effective (*ibid.*, p. 204). During the Mexican political disturbances in the early part of this century, the United States, while regarding the insurgents as outlaws (Hackworth, vol. I, p. 325), nevertheless requested the Mexican Government to treat captured American citizens fighting with the rebels according to the laws of war (*ibid.*, p. 324).

<sup>70</sup> A departure from this practice took place during the Brazilian revolution of 1930. Within a few days of the proclamation of an embargo on arms against the rebels by the United States, the revolution was brought to a successful conclusion. See criticism in Jessup, *loc. cit.*, n. 1, p. 307 above, p. 267.

<sup>71</sup> For an account of the events generally, see *Survey of International Affairs*, 1937, vol. 2; Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, 1939, *passim*.

the insurgent government should be recognised as valid.<sup>72</sup> On August 9 and 10 the Spanish (Republican) Government proclaimed a blockade of insurgent coasts. The British and American Governments raised no objection in principle, provided that it could be made effective.<sup>73</sup> In the same month, Great Britain interned a Republican seaplane which could not leave Gibraltar within twenty-four hours.<sup>74</sup> When the British Government was informed by the insurgents on November 17 of their intention to bombard the city of Barcelona, it merely demanded that a neutral safety zone be provided for the safe anchorage of foreign vessels.<sup>75</sup> On December 3, 1936, a Merchant Shipping (Carriage of Munitions to Spain) Act was passed by the British Parliament, placing an embargo upon carriage of arms to Spain.<sup>76</sup> On December 4 the British and French Governments suggested bringing about an armistice between the parties.<sup>77</sup> A Non-Intervention Agreement<sup>78</sup> was reached between twenty-seven European States, the purpose of which was to ban the export of war materials and the departure of volunteers<sup>79</sup> to Spain. In January, 1937, the British Government proclaimed the enforcement of the Foreign Enlistment Act of 1870,<sup>80</sup> and a joint resolution was passed by the United States Congress imposing an embargo on the export of war materials to Spain.<sup>81</sup>

<sup>72</sup> These decisions were regarded by Professor Smith as amounting to a declaration of neutrality (*loc. cit.*, n. 4, p. 308 above, p. 26).

<sup>73</sup> See Instructions of the State Department to the United States chargé d'affaires, quoted in Garner, *Questions of International Law in the Spanish Civil War*, 31 A.J.I.L., 1937, p. 66, at p. 72. In *Robson v. Sykes* (1938), 54 T.L.R. 727, it was held that a voyage to the insurgent naval base of Seville was not an ordinary commercial voyage, and the refusal to proceed thither was not a breach of contract. [Cf. Anglo-American attitude during the Chinese civil war in 1949, see pp. 386-7 below.]

<sup>74</sup> *New Statesman and Nation*, August 15, 1936, vol. 12, No. 286, p. 218.

<sup>75</sup> Garner, *loc. cit.*, p. 71.

<sup>76</sup> 1 Edw. 8 & 1 Geo. 6, ch. 1.

<sup>77</sup> An armistice implies equal belligerency. See *O'Neill v. Central Leather Co.* (1915), 87 N.J. Law 552; 94 Atl. 789; also Moore, *Digest*, vol. I, p. 194.

<sup>78</sup> There was actually no single document embodying the Agreement. It was merely a declaration of a concerted policy by those States, following the lead given by the Anglo-French Exchange of Notes of August 15, 1936. A Non-Intervention Committee met on September 9, 1936. See Padelford, *The International Non-Intervention Agreement and the Spanish Civil War*, 31 A.J.I.L., 1937, p. 578.

<sup>79</sup> The ban on volunteers was included on February 16, 1937 (O'Rourke, *loc. cit.*, n. 22, above, p. 410).

<sup>80</sup> 33 & 34 Vict. c. 90.

<sup>81</sup> Hackworth, vol. I, pp. 636-8. For the significance of these actions, see below, pp. 389-90.

What does this series of events signify? Even if any one of these acts taken in isolation may not be sufficient to establish the existence of war, the impact of a series of considered and consistent actions cannot be regarded as without meaning. It has been argued by Professor Padelford that such acts did not imply a recognition of belligerency, for to establish such an implication, an act must be such 'as to leave no doubt but (? that) they have accepted the exercise of belligerent rights by the struggling parties'.<sup>82</sup> The events recounted above seem to have clearly shown that the fact of war was not ignored by the foreign States. If the right of the parties to institute a blockade had been admitted by a foreign State, it would have been difficult to argue that that foreign State had not accepted the exercise of belligerent rights. Perhaps it is true that not the exercise of all belligerent rights had been admitted. But assuming the existence of war, such a denial would be unlawful.<sup>83</sup> It may not have been the intention of a foreign State to recognise the belligerency by means of certain particular acts. But unless we are to deny that recognition can be implied,<sup>84</sup> we must deduce the intention from the character of the act, and not *vice versa*. There may often be examples of acts producing results that are least expected. The proclamation of the blockade of the Confederate coasts by President Lincoln is a historic example. There could be nothing further from his intention than the recognition of the belligerency of the Confederacy. Yet that action, by its nature, independently of the intention of its actor, led to certain consequences,<sup>85</sup> from which the actor was no longer free to retract.

Much discussion has centred round the nature of the Non-Intervention Agreement. Was it a collective declaration of neutrality? or a collective refusal to grant recognition? Sir Arnold McNair is in favour of the latter view. The adoption of the non-intervention policy, he argues, means merely that the States 'decided to carry out their normal international duty of not interfering in the domestic affairs of Spain and decided not to

<sup>82</sup> Padelford, *International Law and the Spanish Civil War*, 31 A.J.I.L., 1937, p. 226, at p. 236.

<sup>83</sup> See pp. 335-6 above.

<sup>84</sup> See discussions on implied recognition, below, p. 384 *et seq.*

<sup>85</sup> 'The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed . . .' (*The Prize Cases* (1862), 2 Black 635, 670).

exercise their international right (when it arose) of granting recognition to the rebel government'.<sup>86</sup> But is belligerent recognition an unfettered right of foreign States? If there is no war, recognition of belligerency would no doubt be illegal. If a state of war exists, recognition of belligerency would be a legal duty.<sup>87</sup> Assuming that the situation in Spain was peace and not war, was the action of foreign States in forbidding the export of arms to the legitimate government consistent with international law? Professor Lauterpacht argues that there is no rule of general international law entitling the lawful government to unrestricted freedom in buying munitions.<sup>88</sup> The contrary view was held by a number of States during the Spanish War.<sup>89</sup> In support of his view, Professor Lauterpacht maintains that if foreign States should continue to supply the lawful government with arms while denying them to the insurgents it would amount to an intervention in the struggle, and interference with national independence.<sup>90</sup> It is believed that such an argument can be maintained only upon the assumption that the insurrection has reached such proportions as in fact to constitute a civil war, which necessitates equality of treatment to both contesting parties. The fact that a foreign State adopts an attitude of impartiality and non-interference must be considered as evidence of its admission that a civil war exists. For this reason, whatever the right of foreign States to prevent the export of arms to a lawful government, their decision to treat that government on an equal footing with the insurgents must be an acknowledgment of the fact that the situation in the country concerned is one of war between equal belligerents. The adoption of the non-intervention policy is evidence of, and is justified by, the existence of a civil war. The irregularity in the Spanish case is that, while the fact of civil war was not denied, the foreign States by insisting upon non-recognition, refused to allow the exercise of full belligerent rights by the parties, to which the existence of the war entitled them. The

<sup>86</sup> McNair, *Law Relating to the Civil War in Spain*, 53 L.Q.R., 1937, p. 471, at p. 490.

<sup>87</sup> See below, p. 352 *et seq.*

<sup>88</sup> Lauterpacht, p. 232, note.

<sup>89</sup> See reservations in the Turkish and Yugoslav notes in response to the non-intervention policy (Padelford, *loc. cit.*, n. 78, above, p. 581); speeches of the Soviet, Portuguese and Spanish delegates in the League Assembly, September, 1936 (*ibid.*, p. 584).

<sup>90</sup> Lauterpacht, p. 234.



incident shows that the foreign States had failed in their obligations toward the belligerents, and not that, without the sanction of foreign States, the parties had no right to fight a legal war.

The above discussions lead clearly to the conclusion that like the recognition of States and governments, the recognition of belligerency is the acknowledgment of a certain state of fact—the existence of war. It is this fact, which creates a condition for belligerent rights and duties.<sup>91</sup> Like the case of the recognition of States and governments, an official recognition of belligerency has the effect of evidence and estoppel, and is an expression of the intention of the recognising State to bring its future conduct into line with the requirements of law in consequence of that fact [or, as it is put by Dr. Schwarzenberger, ‘the recognition of belligerency by either the parent State or third States creates the necessary degree of certainty by the temporary and provisional admission that, so long as the insurgents maintain their *de facto* State organisation and accept the international obligations incumbent upon subjects of international law, they are to be treated as if they had international personality’<sup>92</sup>].

Recognition, either express or implied, does not create rights or duties. It has been shown above how such rights have been exercised and such duties fulfilled by parties in a civil strife without any form of recognition. Under normal circumstances foreign States usually make known their recognition of the situation and cause their conduct to conform with the exigencies of fact. By so doing, they may have given the appearance that the rights and duties which occurred are the result of their individual actions. Such an inference is apparent, but not real.

It may perhaps be objected that there have been instances where a foreign State, by its recognition of belligerency, in fact allows belligerent rights to be exercised against it, although there is objectively no civil war. Conversely, there are also cases where a foreign State refuses to allow belligerent rights to be exercised against it on the ground of non-recognition, although a civil war does in fact exist. The former situation is simply a question of estoppel. The foreign State, having willingly allowed itself to be subject to certain obligations, would no longer be free sub-

<sup>91</sup> See P. A. Landon—Letter to *The Times*, August 30, 1937.

<sup>92</sup> [Schwarzenberger, *op. cit.*, n. 57, p. 22 above, p. 366.]

sequently to deny the consequences. The second situation raises the more difficult problem of the juridical structure of the international society. With the state of international society and international law as it is,<sup>93</sup> States are still, on the whole, left to judge each its own cause, and, whatever their duties under international law, there is nothing to constrain them from disregarding them. When a State refuses to fulfil a duty in international law, it is less often due to the lack of clarity in the law, than to the defect in the machinery for enforcing it.

<sup>93</sup> See, for example, Schwarzenberger, 'International Law and Society', 1 *Year Book of World Affairs*, 1947, p. 159, and Corbett, 'Law and Society in the Relations of States', 4 *ibid.*, 1950, p. 23.

## CHAPTER 22

### THE DUTY OF RECOGNITION

As the recognition of belligerency is declaratory in character, and the recognition or non-recognition does not affect the rights and duties of the parties which can only be brought about by the condition of fact, it would seem to follow that recognition must be discretionary. To the same question concerning the recognition of States<sup>1</sup> we have answered that, while the act of recognition may be discretionary, there is a legal duty to treat the new entity according to international law. Although in principle the argument can also be applied here, this distinction between the act of recognition and the treatment according to law is not so clear in the case of belligerent recognition. For in this case, to accord treatment to an insurgent body as a belligerent would in itself be an act of recognition.<sup>2</sup> This identity between treatment as belligerents and the act of recognition argues particularly strongly in favour of the obligatory character of belligerent recognition.

For those who regard recognition of belligerency as a concession of rights, it is natural to deny the duty of recognition. Thus Hall, the strongest exponent of this view, writes :

‘As a belligerent community is not itself a legal person, a society claiming only to be belligerent, and not to have permanently established its independence, can have no rights under that law. It cannot, therefore, demand to be recognised upon legal grounds, and recognition, when it takes place, either on the part of a foreign government, or of that against which the revolt is directed, is from the legal point of view a concession of pure grace.’<sup>3</sup>

It is indeed a logically unassailable argument that a body having no personality in law, cannot demand the right of recognition. But to say that a belligerent body is not a legal person would be pushing the logic too far. Following this logic, it would be

<sup>1</sup> Above, p. 52.

<sup>2</sup> Below, p. 384 *et seq.*

<sup>3</sup> Hall, p. 39.

impossible to explain how a belligerent community could be capable of becoming a recipient of rights, even when they are conceded to it out of 'pure grace'. It would be impossible to maintain the principle that civil wars can be governed by rules of international law as applied in international wars.

Westlake follows Hall in denying the legal right of belligerent communities to be recognised,<sup>4</sup> but he doubts Hall's remark that a belligerent community has no legal personality. Even if it should be held that there is no option where the existence of war is clear, he argues, it still remains for the recognising State to judge for itself as to the existence of this fact.

Two other writers holding this view may be mentioned, namely, Woolsey and Sir Arnold McNair. In criticising President Monroe's statement that the insurgents in Spanish America 'were entitled by the law of nations, as equal parties to a civil war',<sup>5</sup> Woolsey advanced the extreme view that the insurgents had no rights, and that the concession of belligerency is made on account of considerations of policy or on grounds of humanity.<sup>6</sup> He only cited in his support the case of Paul Jones (1779), in which Great Britain declared Paul Jones a pirate, because he was a British subject operating under the commission of the revolting Colonies. But that case was far from conclusive, as it was never brought to a conclusion and a contrary claim had always been kept alive by the United States until as late as 1844.

Sir Arnold McNair<sup>7</sup> argues his case with more support of practice. But the precedents upon which he relies, with the exception of Secretary Fish's Letter, are far from showing conclusively the discretionary character of belligerent recognition.

First, he mentions the case of Paul Jones, to which reference has already been made.

In the case of *The Macedonian* (1863),<sup>8</sup> it is true that the argument of Chile, based upon the rule of neutrality, was rejected, but the American argument which prevailed was that Chile was not recognised *as a State* until 1822. There was no decision bearing directly upon the question of the recognition of belligerency.

<sup>4</sup> Westlake, *op. cit.*, vol. I, pp. 55-6.

<sup>5</sup> Above, pp. 338-9.

<sup>6</sup> Woolsey, *op. cit.*, n. 2, p. 105 above, p. 302.

<sup>7</sup> McNair, *loc. cit.*, n. 86, p. 349 above, p. 471.

<sup>8</sup> Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, vol. 2, 1924, p. 182; Moore, *International Arbitrations*, vol. 2, p. 1449 *et seq.*, cited in McNair, *loc. cit.*, p. 478.

The two Opinions by the British Law Officers mentioned by Sir Arnold<sup>9</sup> are definitely in advocacy of the obligation of recognition.

The first concerned the revolt of St. Domingo in 1864. In an opinion of August 22, 1864, the Law Officers advised that 'if the facts are such as really to constitute a State of War between the contending parties, according to the law of nations', it would not be open to neutral powers to refuse to submit themselves to the exercise of belligerent rights 'merely by declining to acknowledge its existence'. The vigour of this statement was not in the least neutralised by the fact that the British Government did not issue a declaration of neutrality. This step was unnecessary, so long as Great Britain had submitted to such duties as were required from a neutral State.

The second was concerned with the Carlist wars in Spain. In 1874 the Serrano Government in Spain declared a blockade of the Northern Coast of Spain. The Law Officers advised that 'assuming the blockade to be effective, Her Majesty's Government must in our opinion recognise the fact that it exists *de facto* and *de jure*. The result, however, will be that the Carlists henceforth become belligerent'. Its value as a precedent was in no way impaired by the fact that the blockade never took effect. On the contrary, the case was a particularly strong one because the Serrano Government was itself a government not recognised by Great Britain.

Mr. Canning's dispatch to Sir Stratford Canning regarding the Greek rebellion of 1825 is a classic example of the official British attitude regarding the obligation of recognition. He says:

'The character of belligerency was not so much a principle as a fact; that a certain degree of force and consistency, acquired by any mass of population engaged in war entitled that population to be treated as a belligerent, and, even if their title were questionable, rendered it the interest well understood by all civilised nations so to treat them; for what was the alternative? A Power or a Community (call it what you will) which was at war with another, and which covered the sea with its cruisers, must either be acknowledged as a belligerent, or dealt with as a pirate.'<sup>10</sup>

<sup>9</sup> McNair, *loc. cit.*, p. 480.

<sup>10</sup> Dispatch of October 12, 1825, quoted by Lord Russell in the House of Commons, Parl. Deb., 3rd ser., vol. 162, col. 1566.

Obviously Canning had put forward the second alternative only to demonstrate the impossibility of the proposition.

Secretary Fish's letter to Motley,<sup>11</sup> as quoted by Sir Arnold McNair, does, indeed, seem to provide positive evidence of the discretionary nature of recognition. Yet, after saying that 'every sovereign power decides for itself, on its responsibility', the question of recognition, it went on to say that 'the rightfulness of such an act depends on the occasion and the circumstances', and that it should be 'deliberate, seasonable and just in reference to surrounding facts'. This last remark shows that the discretion of the foreign State can be exercised only to the extent of determining whether a particular state of facts exists. It would not be free to deny recognition in disregard of a standard set by international law.

As to textbook writers, it is indeed true that little authority can be found for the obligatory view of recognition. But this does not warrant the conclusion that the evidence is against the existence of such an obligation. The obvious explanation for this silence is that for those who regard recognition as a declaration of fact, the insurgent community may demand the exercise of belligerent rights, but there would be no point in demanding a formal declaration of recognition.<sup>12</sup> Discussion on the right to be recognised is therefore not in keeping with their treatment of the subject.<sup>13</sup>

If 'recognition' is understood in this sense—that is, not as a condition precedent to the exercise of belligerent rights—then those who are opposed to the obligatory character of recognition must be admitted to be technically correct.

A right to be recognised can only be maintained by those who regard recognition as both constitutive and obligatory.<sup>14</sup> In practice, however, since the refusal to accord recognition is often accompanied by, and identified with, the denial of belligerent rights, the claim for the exercise of belligerent rights usually assumes the form of a claim for recognition. Therefore, for practical purposes, even under the declaratory theory, the right to recognition may also be considered to exist.

<sup>11</sup> September 25, 1869, Moore, *Digest*, vol. I, pp. 192-3.

<sup>12</sup> Jaffe, *op. cit.*, n. 21, p. 15 above, p. 137.

<sup>13</sup> Walker, *loc. cit.*, n. 19, p. 312 above, pp. 202-3.

<sup>14</sup> For a vigorous exposition of this view, see Lauterpacht, Part III.

In a controversy of this nature, it may be expected that opinions of writers are almost evenly divided and there is no difficulty for either side to enlist a number of writers as supporters of its view.<sup>15</sup> Professor Lauterpacht, in his important recent work on the subject,<sup>16</sup> has exhaustively reviewed the opinions of writers and it is not necessary to go over the same ground here.<sup>17</sup> His arguments, so far as they concern the duty of recognition, are entirely in agreement with the views put forward in this work. The duty of recognition, he argues, necessarily follows from the fundamental principles of State independence and the law-creating force of facts. To refuse recognition when it is deserved would be to deny the nation its right of political self-determination<sup>18</sup> and to disregard the practical necessity of conducting a war in a regulated manner when all the conditions necessitating the laws of war are present.<sup>19</sup> The principles of the laws of war, it is pointed out, are in their essence independent of the formal status of the parties to the struggle. The same considerations of humanity, the same fear of reprisals, and the same desire to avoid involvement exist, whether it be a civil or an international war.

While his arguments are unanswerable so far as they concern the obligatory character of recognition, Professor Lauterpacht's general theory of belligerent recognition suffers the same setbacks as does his theory of State recognition because of his espousal of the constitutive view. To the argument that an insurgent body, not being an international person, at least prior to the recognition, has no right to be recognised, he answers that when certain prescribed conditions are fulfilled, the parties to the civil war would become *pro tanto* subjects of international law

<sup>15</sup> Wehberg claims that the majority of writers are in favour of the discretionary view (*La Guerre Civile et le Droit International*, 63 *Hague Recueil*, 1938, p. 1, at p. 107). The contrary claim is made by Lauterpacht (p. 240), who lists as supporters of his view: Vattel, Bluntschli, Fiore, Lorimer, Kent, Wheaton, Bernard, Harcourt, Westlake, Politis and the majority of writers during the Spanish Civil War of 1936-1939. These latter include Scelle, Wehberg, Padel-ford, Smith and O'Rourke. For the contrary view are the following writers: Weisse, Rougier, Nys, Gemma, Woolsey, McNair, Kunz, Noël-Henry, and Hall. See Lauterpacht, pp. 240-3.

<sup>16</sup> Lauterpacht, Part III.

<sup>17</sup> To Lauterpacht's list of writers who hold the obligatory view, we may add Halleck, *op. cit.*, n. 21, p. 15 above, p. 85; Oppenheim, vol. 2, s. 76; Garner, *Recognition of Belligerency*, 32 *A.J.I.L.*, 1938, p. 106; Phillimore, *op. cit.*, n. 21, p. 15 above, vol. 2, p. 24.

<sup>18</sup> Lauterpacht, p. 228 *et seq.*

<sup>19</sup> *Ibid.*, p. 245.

‘by the operation of the law’, although their rights ‘may not be operative so long as recognition of belligerency has not been granted’; and that even if conceding that insurgents, not being subjects of international law, do not have the right to recognition, the duty of recognition may still be owed to the international community.<sup>20</sup> The first argument amounts to an abandonment of the constitutive view, for the capacity to possess rights, though not immediately operative, presupposes legal personality. To the second argument, the same criticism with regard to the recognition of States may be applied, namely, that the international community can be entitled to have the belligerency of an insurgent body recognised only when the conditions of war in fact exist, and when such conditions exist, the rights of the belligerents would be established, independently of recognition. The learned professor himself admits in several places that consequences of belligerent recognition may be brought about in the absence of recognition.<sup>21</sup> There seems to be obvious difficulty in maintaining a theory of the constitutive character of recognition together with the view that recognition is obligatory.

Turning to the practice of States, we find the United States, at least prior to the Civil War, strongly advocating the right of insurgents to be recognised.<sup>22</sup> Even on the question of the British recognition of the Confederacy, there was little dispute over the principle.<sup>23</sup> The American courts were particularly pronounced in their advocacy of the obligatory view. They have repeatedly declared that when circumstances are such as to constitute war, the world is bound to acknowledge the fact, and the contending parties are entitled to the exercise of belligerent rights.<sup>24</sup> The American practice is summed up by Bernard as follows:

‘That, in a struggle for independence carried on by a revolted portion of the State against the State itself, foreign nations may and *should* maintain a strict and impartial neutrality, opening their

<sup>20</sup> Lauterpacht, p. 237.

<sup>21</sup> Thus, he thinks that the enforcement of neutrality legislation (p. 235) and the equal treatment of insurgents with the lawful government (p. 233) may take place in the absence of recognition, and that, despite non-recognition, the lawful government is not liable for acts of insurgents, because such recognition is of ‘evidential value’ only (p. 249).

<sup>22</sup> Above, pp. 337, 339.

<sup>23</sup> Above, p. 342.

<sup>24</sup> For instance, *The Prize Cases* (1862), 2 Black 635, 666, 667; *Williams v. Bruffy* (1877), 96 U.S. 176, 189, 191; *Ford v. Surget* (1878), 97 U.S. 596, 611.



ports to both parties and on the same conditions, and not interfering in favour of either to the prejudice of the other.’<sup>25</sup>

The British practice has been illustrated by several official documents mentioned above.<sup>26</sup> One circumstance which, in particular, has been uniformly held by the British Government as impelling recognition is the assertion of belligerent rights by the legitimate government. To the charge of the premature recognition of the Confederacy, Earl Russell retorted:

‘It was, on the contrary, your own Government which, in assuming the belligerent right of blockade, recognised the Southern States as belligerents. Had they not been belligerents the armed ships of the United States would have no right to stop a single British ship upon the high seas.’<sup>27</sup>

This argument was also stressed by the British Law Officers, who argued:

‘The course pursued by the declaration of blockade on the part of the Government of the United States had rendered this recognition both necessary and inevitable. The right of blockade which pressed so severely upon the interests of neutral States, was a right incident, and incident only, to a state of war in which two or more belligerents were engaged. . . .’<sup>28</sup>

In support of this argument, it is pointed out by Bernard that ‘it must be a confused mind which fails to see that, if the right existed on one side, it existed also on the other—or, in other words, that any rule of international law which may be invoked as against neutrals by either belligerent may be equally invoked by both’.<sup>29</sup>

During the revolt of St. Domingo against Spain in 1864, the action of the British Government was criticised by the Law Officers. Having acquiesced in the institution of a blockade by the Spanish Government, the British Government, it was argued,

<sup>25</sup> Bernard, *op. cit.*, n. 12, p. 107 above, p. 117, n. 2 (italics added).

<sup>26</sup> See above, p. 354.

<sup>27</sup> Moore, *Digest*, vol. I, p. 190.

<sup>28</sup> Opinion of February 14, 1867 (Smith, vol. I, p. 309). [Cf., however, the declarations of ‘blockade’ by the Chinese Government, June to August, 1949. Both the British and American Governments declined to recognise this ‘blockade,’ but neither was prepared to use naval forces to assist merchant vessels to run the ‘blockade’ (*The Times*, June 25, 1949, U.S. Information Service, *Daily Wireless Bulletin*, No. 1019, July 2, 1949), and neither was at that time prepared to recognise the Chinese Communists in any way (see n. 13, p. 119 above).]

<sup>29</sup> Bernard, *op. cit.*, p. 116.

was no longer free to deny the same rights to the insurgents.<sup>30</sup> The same argument was advanced concerning the Carlist War in Spain, 1874.<sup>31</sup>

The British practice was based upon the idea that the recognition of belligerency is the acknowledgment of the fact of war. As it takes two belligerents to fight a war, it is inconceivable that one party should be allowed to exercise belligerent rights while they are denied to the other.

‘Belligerent recognition,’ writes Lorimer, ‘is a mere declaration of impartiality. To withhold from the claimant for recognition the rights of belligerency, whilst we extend them to the parent State, would plainly be to take part against it in the war—to violate its blockade whilst we respect that of the parent State, would be a non-neutral act.’<sup>32</sup>

The question whether the contesting parties in a civil war possess a right to belligerent recognition was acutely raised during the Spanish Civil War of 1936-1939. While the fact that the conflict possessed all the features which characterise war was never disputed, the European Powers nevertheless decided that belligerent recognition should be withheld, not only from the insurgents, but from the legitimate government as well. The British Foreign Secretary, Mr. Eden, announced in the House of Commons on November 23, 1936, that the British Government, not having accorded belligerent rights at sea to either side, British naval protection would be given to British merchant ships outside the three-mile limit of Spain.<sup>33</sup> The same policy was adopted by the French Government.<sup>34</sup> The German Government condemned the assertion of belligerent rights by the Spanish Republican Government as a ‘crime against the right of free navigation on the open sea’, and declared that further interference with German shipping beyond the three-mile limit would be met by force.<sup>35</sup> Both the British and German Governments carried out their

<sup>30</sup> Smith, vol. I, pp. 314-5. The advice was reiterated in an opinion of November 22, 1864 (*ibid.*, p. 318).

<sup>31</sup> *Ibid.*, p. 321; above, p. 354.

<sup>32</sup> Lorimer, *op. cit.*, n. 19, p. 15 above, vol. I, p. 142.

<sup>33</sup> Parl. Deb., H.C., 5th ser., vol. 318, col. 7.

<sup>34</sup> Padelford, *loc. cit.*, n. 82, p. 348 above, p. 233.

<sup>35</sup> *The Times*, August 21, 1936.

threats, and forced the release of prizes captured by Republican ships.<sup>36</sup>

The recognition of belligerent rights within, but not beyond, territorial waters is an anomaly. If the fact of war had not been conceded, foreign shipping ought not to be subjected to interference even within the territorial waters. It is a settled principle that in time of civil war ports cannot be closed unless in exercise of belligerent rights.<sup>37</sup> This principle cannot be maintained if belligerent activities are allowed in the territorial waters. On the other hand, if the fact of war had been admitted, as the conduct of foreign States seemed to imply,<sup>38</sup> the partial permission to exercise belligerent rights certainly finds no justification in international law. At any rate, the right of the lawful government to assume a belligerent status, in the light of the existence of war, could not be denied on any ground.<sup>39</sup>

In defence of the policy of the European Powers, Sir Arnold McNair argues that, there being no duty of recognition, the partial exercise of belligerent rights by insurgents befitted the condition of a recognition of insurgency. A right of 'quasi-blockade' may be exercised by insurgents so recognised which is confined in its operation to the three-mile limit.<sup>40</sup>

The learned writer seems to argue that, since recognition of belligerency is not a duty, a foreign State may recognise an inferior status of 'insurgency', even though the struggle may partake of all the characteristics of a real war. This argument has been effectively opposed by Walker, who argues that the 'recognition of insurgency' is the acknowledgment of a state of things in which belligerency does not exist in fact, a situation quite dissimilar to the conditions in Spain. Foreign States may object to the capture of ships by a captor in the service of a community which does not fulfil the requirements of belligerency at all, but

<sup>36</sup> See the cases of *The Gibel Zerjhon* and *The Kamerun*, cited in Smith, *loc. cit.*, n. 4, p. 308 above, p. 27. See also *The Palos* case, where Spanish ships were seized by Germany in retaliation for the capture of German ships (*The Times*, January 2, 1937; see H.M.S.O., *Document on German Foreign Policy, 1918-1945*, Series D, vol. 3, *The Spanish Civil War*, 1951, p. 201).

The recognition of the Nationalist faction as the Government of Spain by Germany and Italy gave rise to the speculation whether belligerency was also recognised by these countries. The case of *The Palos* seems to indicate that there was no such recognition. On this point, see Wehberg, *loc. cit.*, p. 97.

<sup>37</sup> See below, p. 385.

<sup>38</sup> See above, pp. 346-7.

<sup>39</sup> See Oppenheim, vol. II, p. 197, n. 6; Lauterpacht, pp. 193-9.

<sup>40</sup> McNair, *loc. cit.*, p. 483.

they cannot object to it merely because the belligerent actually existing has not been recognised.<sup>41</sup>

Nor can the policy of the Powers be justified by the argument that to refrain from protecting their ships within the three-mile limit was merely an act of self-abnegation and did not involve the recognition of belligerency.<sup>42</sup> In time of peace, it is true, the protection of national ships by the navy stops at the outer edge of the three-mile limit of another State. But this only means that protection is being provided therefrom by the territorial State, who would be held liable for molestations within the three-mile limit. Such a responsibility cannot be shirked, unless the situation is one of war. The foreign States did not exact responsibility from the Spanish Government, not because of self-abnegation, but because they had no right to do so. Their right to protection could not be asserted in a condition of actual warfare. By refraining from claiming exemption from injurious acts of war, these Powers had in fact acknowledged the state of affairs as being no longer peace, but war. That being the case, not only was there no case of self-abnegation within the three-mile limit, but even the denial to the belligerents of their belligerent rights on the high seas was unjustifiable.

The situation in Spain was plainly a case of war, a fact which was admitted in various instances, but never formally recognised. Why was the recognition refused? The principal reason as given by Lord Plymouth, Chairman of the Non-Intervention Committee, was that the presence of foreign volunteers made normal application of the principles of civil war impossible.<sup>43</sup>

It is difficult to share the view that the participation by foreign volunteers could in any way affect the application of the laws of war. The participation by foreign States, at most, transformed the struggle into an international war. It would be all the more reason for the application of the laws of war. It has been argued that the purpose of non-recognition was to minimise the fearful possibility of a general embroilment. But it is difficult to see how non-recognition could be a useful means to that end.

<sup>41</sup> Walker, *loc. cit.*, pp. 209-10.

<sup>42</sup> McNair, *loc. cit.*, p. 493.

<sup>43</sup> *The Times*, July 17, 1937. Similar views were expressed by Mr. Eden in the House of Commons, June 25, 1937 (Parl. Deb., H.C., 5th ser., vol. 325, col. 1608) and Lord Halifax in the League Council (L.o.N. Off. J., 1938, p. 330). This view is supported by Lauterpacht, pp. 251-2.

The prevention by the several States of the departure of their nationals and the embargo on arms could in no way be made less effective by the recognition of belligerency. The purpose of the rules regarding belligerent recognition and the rules of neutrality is precisely the avoidance of involvement. If the fear of becoming involved was the principal motive, it would seem that recognition, and not non-recognition, would prove a more effective means for the securing of that desired end. The result of non-recognition in this case was merely the creation of confusion in the law of recognition and the distortion of the legal and logical consequences of a state of actual war.

It must be remembered that the holders of the discretionary view of recognition have never stated their theory in unqualified terms. Hall admits that when a civil struggle reaches a stage of development, 'Humanity requires that the members of such a (insurgent) community shall be treated as belligerents, and if so there must be a point at which they have a right to demand what confessedly must be granted.'<sup>44</sup> But the obligation to recognise the belligerency of the insurgents, he insists, 'flows directly from the moral duty of human conduct', and is therefore not a legal obligation.

To admit that the recognition of belligerency is a duty, albeit a moral duty, is to admit a great deal. The bulk of the international law of war, and no less so the principles regarding the recognition of belligerency, is designed for one professed purpose, namely, to bring armed hostilities within humanitarian limits.<sup>45</sup> If obligations assumed for reasons of humanity are to be regarded as merely moral obligations, there would be very little left in the laws of war which may be regarded as imposing a legal obligation. If we are to regard civil war as a fact which carries with it legal consequences, it would seem impossible to deny that the duty to respect these legal consequences is a legal duty. Where the failure to respect them would involve a foreign State in conduct inconsistent with neutrality, were a war between two recognised States in progress, it would be clear that a legal duty is involved. We may conclude by saying that the duty of the third States—and the lawful government—in admitting the exercise of rights of war

<sup>44</sup> Hall, p. 38. Similarly, Westlake, *op. cit.*, vol. I, pp. 55-6.

<sup>45</sup> See Canning's dispatch to Wellesley, December 31, 1864 (Smith, vol. I, p. 296).

by the contending parties is based upon exactly the same considerations as in a case of an international war. Refusal to recognise a state of war when it exists would involve third States in the risk of having to take sides, and might cause the lawful government to take reprisals.<sup>46</sup> When a State is prepared to face such risks, then, and only then, may the non-recognition be regarded as discretionary.

<sup>46</sup> See Lauterpacht, p. 53.

## CHAPTER 23

### CONDITIONS FOR RECOGNITION

THERE seems to be unanimity among writers that recognition of belligerency cannot be accorded unless certain conditions are fulfilled. To one set of conditions, which may be called 'objective conditions', they are also in practical agreement. But as to 'subjective conditions', the divergence of view is as sharp as in the question of the duty of recognition.

The principal objective condition for recognition is the existence of an actual war. But what are the conditions of fact which justify the conclusion that a war actually exists? According to Dana, two factors need to be considered: 'the existence of a *de facto* political organisation of the insurgents, sufficient in character, population and resources to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State'; and the actual employment of military forces on each side acting in accordance with the rules and customs of war.<sup>1</sup> This view is shared by numerous writers<sup>2</sup> and by the Institute of International Law.<sup>3</sup> It is also the view adopted in Anglo-American practice.<sup>4</sup> In some of these opinions, special emphasis is laid upon the character of the political organisation of the insurgents. Observance of the international laws of war

<sup>1</sup> *Dana's Wheaton*, s. 23, n. 15.

<sup>2</sup> Westlake, *op. cit.*, n. 15, p. 15 above, vol. I, p. 51; Beale, *The Recognition of Cuban Belligerency*, 9 H.L.R., 1895-1896, p. 406, at p. 407; Oppenheim, vol. 2, s. 76; Wehberg, *loc. cit.*, n. 15, p. 356 above, pp. 87-8; Lauterpacht, p. 176; Fauchille, *op. cit.*, n. 24, p. 15 above, vol. I, Pt. I, pp. 309-10; Rougier, *op. cit.*, n. 2, p. 97 above, pp. 213, 384; Brierly, *op. cit.*, n. 17, p. 15 above, p. 126. [According to Moore: 'The only kind of war that justifies the recognition of insurgents as belligerents is what is called "public war"; and before civil war can be said to possess that character the insurgents must present the aspect of a political community or *de facto* power, having a certain coherence, and a certain independence of position, in respect of territorial limits, of population, of interest and of destiny', 21 *Forum*, 1896, p. 291; *Collected Papers*, vol. 2, p. 100.]

<sup>3</sup> Article 8 of the Resolution of 1900 (Scott, *op. cit.*, n. 9, p. 335 above, p. 159).

<sup>4</sup> See the opinion of the British Law Officers of August 14, 1867, regarding the Cretan insurrection (Smith, vol. I, p. 263); Messages of President Grant of June 13, 1870, and December 7, 1875, regarding the Cuban insurrections (Moore, *Digest*, vol. I, p. 195, pp. 196-7).

would be impossible without an organisation closely assimilated to a State. The Cuban insurrection of 1868-1878 was refused recognition by the United States ostensibly on this ground.<sup>5</sup> Rougier takes a more lenient view, suggesting that the government of the insurgents need not be stable or generally accepted. It is sufficient that it maintains an intention to supplant the legitimate government and is obeyed by the insurgents themselves.<sup>6</sup>

The requirement of the observance of the rules of war as a condition for recognition reveals a logical weakness in the concession theory. The admission of this condition must necessarily presuppose that the contesting parties possess sufficient capacity to exercise the rights of war *prior* to the recognition. To argue that they can have no rights until recognised and to prescribe as a condition precedent to recognition the actual exercise of these rights is a logical absurdity.

As regards subjective conditions, two elements may be considered: the probability of success, and the extent to which the interests of third States are affected.

Regarding the first point, President Monroe in his message to Congress, March 8, 1822, remarked that, as soon as the revolt in Spanish America assumed such a form 'as to make the success of the provinces probable', the insurgents were entitled to rights of belligerency.<sup>7</sup> Fauchille thinks that recognition may be accorded where the forces engaged appear to be equal and it is difficult to foresee the issue of the conflict.<sup>8</sup> Hall puts it in the reverse form, saying that the presence of certain conditions justifies recognition 'unless it is evidently probable that the independent life of the insurgent government will be so short that the existence of war may be expected to interfere with the interests of the foreign State in a merely transient and unimportant manner.'<sup>9</sup> It is believed that neither the probability nor the improbability of success, nor the impossibility of foreseeing the outcome of the conflict ought to be made the decisive factor in the determination of the question of recognition. Elements of this

<sup>5</sup> Moore, *Digest*, vol. I, p. 195.

<sup>6</sup> Rougier, *op. cit.*, p. 387.

<sup>7</sup> See above, p. 339.

<sup>8</sup> Fauchille, *op. cit.*, vol. I, Pt. I, p. 309.

<sup>9</sup> Hall, pp. 40-1.



kind are so speculative and subjective, that to accept them as a test for the legality of recognition is in effect to do away with all tests.<sup>10</sup>

This argument may also be used against setting up the interests of the third State as a condition for recognition. The view that recognition may not be accorded by third States unless their interests are immediately involved has strong proponents.<sup>11</sup> Instances in the practice of States can also be found to support this view. Thus, Secretary Fish questioned the 'necessity and propriety' of the British recognition of the belligerency of the Confederacy.<sup>12</sup> The test of the necessity of defining relations was set up by Presidents Grant and McKinley as a ground for not recognising the Cuban rebellions.<sup>13</sup>

As has been pointed out, the question whether a situation so affects the interests of a third State as to necessitate a definition of relations with the contending parties is entirely a matter of subjective appreciation, incapable of an objective determination. It is useless as a permissible condition for recognition, because it is equivalent to saying that the objective conditions having been fulfilled, it is left entirely to the discretion of the third State to decide whether recognition is opportune. To maintain such a test is to deny the duty of recognition, for it is always open to the third State to say that its interests are not sufficiently affected. It is thought by some writers that the test of necessity is valuable in narrowing down the freedom of third States in their effort to give gratuitous support to the insurgents.<sup>14</sup> It is doubtful whether this desired result can be attained if the third State alone is competent to decide upon the existence of the necessity. On the other hand, the lawful government is just as eager as the recognising

<sup>10</sup> See Wehberg, *loc. cit.*, p. 88; Rougier, *op. cit.*, p. 389. See note of Secretary Forsyth to Mr. Gorostiza, Mexican Minister, September 20, 1836, in which the remark in Monroe's message, if not repudiated, was interpreted as insignificant (Moore, *Digest*, vol. I, pp. 176-7).

<sup>11</sup> Hall, p. 40; Westlake, *op. cit.*, vol. I, p. 51; *Dand's Wheaton*, s. 23, n. 15; Holland, *Lectures on International Law*, 1933, p. 445; Calvo, *op. cit.*, n. 19, p. 337 above, vol. I, s. 84; Oppenheim, vol. II, s. 76; Brierly, *op. cit.*, p. 126; McNair, *loc. cit.*, n. 86, p. 349 above, p. 476; Lauterpacht, pp. 239-40; Rougier (*op. cit.*, p. 384), who, however, criticises the more extreme view of de Olivart. See also other authorities cited in Wehberg, *loc. cit.*, p. 89.

<sup>12</sup> Fish to Motley, May 15, 1869 (Moore, *Digest*, vol. I, p. 192).

<sup>13</sup> Grant's Message, December 7, 1875 (*ibid.*, p. 196), quoted in McKinley's message, December 6, 1897 (*ibid.*, p. 199).

<sup>14</sup> Lauterpacht, p. 240.

third State to employ this test to its own advantage.<sup>15</sup> If the lawful government may also have a say in deciding on the necessity of recognition, there will be no end to the controversy, as the subjectivity of the matter would not admit of impartial ascertainment.<sup>16</sup>

To postulate the interests of third States as a condition for recognition, it may be submitted, incurs the danger of seeing the question of belligerent recognition in a wrong perspective. As in international war, the application of international law to a situation of domestic war arises from the desire and the necessity to regulate, for the orderly conduct of all parties concerned, the belligerents as well as neutrals. The egoistic interests of third States have no right to demand priority of consideration.<sup>17</sup>

Civil War is a fact, the existence of which does not depend upon acknowledgment. A foreign State, which is so far removed from the theatre of war that it may not feel a definition of attitude compelling, may yet, as a matter of law, not be free to ignore the fact. This principle is clearly established with regard to international wars.<sup>18</sup> The principle is certainly applicable to a civil war. It is conceivable that, in case of a civil war in a remote country, while the interests of a third State may not be materially affected, questions of law may arise in private litigation depending upon the determination of the legal situation abroad. Whether recognised or not, the fact of civil war remains, and with it the legal consequences of war.<sup>19</sup> When a civil war exists, it exists with regard to all States. For a State whose interests are immediately involved the urgency for a declaration of attitude is more manifest<sup>20</sup>; but there is nothing to prevent it from submitting itself to neutral duties without any express pronouncement.<sup>21</sup> The

<sup>15</sup> Garner criticises Dana's insistence on this test as an effort to support the national cause (Garner, *loc. cit.*, n. 17, p. 356 above, p. 111). See also Rougier's criticism of de Olivart (*op. cit.*, p. 348).

<sup>16</sup> See the Anglo-American controversy over the British recognition of the Confederate belligerency (Moore, *Digest*, vol. I, pp. 188-9, 192).

<sup>17</sup> See Wehberg, *loc. cit.*, p. 91.

<sup>18</sup> Oppenheim, vol. II, p. 515; Moore, *An Appeal to Reason*, 11 *Foreign Affairs*, 1935, p. 547, at pp. 561-2.

<sup>19</sup> In *Martinez v. Bechard et Mathieu* (1939) the French Trib. Com. de Narbonne held that the acts of hostilities during the Spanish Civil War, 1936-1939, which was unrecognised by France, constituted *force majeure*, exonerating a carrier from the liability for the loss of goods (51 R.G.D.I.P., 1947, pp. 256-7).

<sup>20</sup> See Historicus, Letter to *The Times*, March 22, 1865.

<sup>21</sup> Bernard, *op. cit.*, n. 12, p. 107 above, p. 116.

extent to which its interests are being affected may be a measure of the necessity of a general pronouncement of attitude by a third State, but it is not the condition under which the acknowledgment of the fact of war or the submission to neutral duties is permissible.<sup>22</sup>

<sup>22</sup> See similar view of Garner, *loc. cit.*, p. 111; Wehberg, *loc. cit.*, pp. 90-1. That condition is omitted by Fauchille (*op. cit.*, vol. I, Pt. 1, p. 310) and the Institute of International Law (Resolutions of 1900, Scott, *op. cit.*, p. 159), which deliberately rejected it (see *Annuaire de l'Institut de Droit International*, 1900, pp. 222-3).

## CHAPTER 24

### MODES OF RECOGNITION

IN our previous discussion we have shown that an act of recognition of belligerency is an acknowledgment by a State of the existence of a civil war and an expression of the intention to assume the rights and duties under the laws of war and neutrality. Theoretically, since the existence of a civil war is a fact independent of recognition, it would follow that the question by whom recognition should be given is altogether without significance. In practice, however, since there is no international authority to judge the existence of a civil war, recognition by individual States must be regarded as possessing great evidential value, which in some countries is conclusive upon the organs of those States. Moreover, so long as recognition does not in fact become automatic, recognition, however well justified, may nevertheless touch the sensibility of the parties and must be handled with tact and deliberation. For this reason, the question of the capacity to recognise and the form in which recognition is effected must be regarded as deserving careful study.

Two questions arise in connexion with capacity of the three bodies concerned in a civil war—the established government, the insurgent body and the foreign State. Who is competent to pronounce upon the existence of war? What particular organ of those bodies should be entrusted with the power to make the pronouncement? This latter question, as we shall see, leads to, and more or less blends with, the further question of form.

#### § 1. WHO IS COMPETENT TO ACCORD RECOGNITION?

This question is of great importance to those who hold the concession theory. To them, the recognition of belligerency entails consequences which vitally affect the rights and duties of all the three parties concerned. They must make sure that the exercise of a power of such gravity is reserved in the most worthy hands.

*Exercise of belligerent rights by the insurgents.* The right

of the insurgent body to pronounce that a war exists is, according to those holding the concession theory, out of the question. An insurgent body, at least one which is unrecognised, is, according to them, legally non-existent as an entity, and can perform no act productive of legal results. It cannot create its own legal existence by an act which is devoid of legal value.<sup>1</sup>

The practice of nations, however, shows that this theory has not always been followed. In numerous instances belligerent rights were exercised by insurgents before their recognition by foreign States. For example, on the occasion of the detention of the Spanish ship *Santa Theresa del Jesus* by a Buenos Aires privateer during the revolt of the Spanish colonies in America, the British Government was advised to treat the case as a prize of war between two belligerents.<sup>2</sup> Again, writing with reference to some ships condemned by the Peruvian authorities, Robinson considered that 'the asserted independent governments would have a right to exercise the ordinary privileges of war in maritime capture'.<sup>3</sup> At the time of these events the British Government had not yet fully recognised the belligerency of the insurgents.<sup>4</sup>

During the Greek rebellion against Turkey, on various occasions prior to the British recognition of belligerency, June 6, 1823, the exercise of belligerent rights by the insurgents passed unchallenged by the British Government.<sup>5</sup> Such rights were even exercised prior to the Neutrality Proclamation of the Ionian Government on June 7, 1821.<sup>6</sup>

In our previous discussion we have mentioned other instances where belligerent rights have been exercised by insurgents in the absence of any recognition by any sovereign State.<sup>7</sup> These instances show that, while the insurgents cannot act in any way to bind the other parties, their assertion of rights of belligerency

<sup>1</sup> Hall, p. 39; Oppenheim, vol. II, s. 59; Resolutions of the Institute of International Law, 1900, Article 5 (2) (Scott, *op. cit.*, n. 9, p. 335 above, p. 158); McNair, *loc. cit.*, n. 86, p. 349 above, p. 471; Wilson, *Insurgency and International Maritime Law*, 1 A.J.I.L., 1907, p. 46.

<sup>2</sup> Opinion of August 11, 1818 (Smith, vol. I, p. 275).

<sup>3</sup> Opinion of September 14, 1822 (*ibid.*, p. 279).

<sup>4</sup> The recognition did not take place until February 21, 1823 (Smith, *ibid.*, p. 281). On October 18, 1822, Canning was still threatening the Spanish Government with the granting of recognition (*ibid.*, p. 279).

<sup>5</sup> See the acquiescence in the insurgent blockade (*ibid.*, p. 287); and the Admiralty instructions of April 30, 1823, to maintain neutrality (*ibid.*, p. 288).

<sup>6</sup> See above, p. 340.

<sup>7</sup> See above, p. 337.

cannot be fairly opposed if there is a real war.<sup>8</sup> On one occasion, the United States even went so far as to admit that 'the demonstration by the insurgents of their "ability" actually to enforce a blockade involving, as the measure does, the assertion of one of the highest rights of public war, would be accepted as satisfactory proof of the justice and propriety of permitting them to exercise such rights'.

*Recognition by the established government.* The recognition of belligerency by the established government before its recognition by any foreign Power is a less common phenomenon. To say the least, such a recognition is necessarily a sign of the weakness of the established government, and any act that publicises this fact would inevitably enhance the prestige of the insurgents to the detriment of the established government. Apart from this psychological reason, the assimilation of a civil strife to an international war brings about changes of vital importance in the rights and duties between the contesting parties, as well as between each of them and foreign States. These changes include the rights of the contestants to visit and search neutral vessels; to intercept contraband destined for enemy ports; to capture and condemn neutral vessels for breach of blockade; to set up prize courts for the adjudication of maritime captures. To the insurgents accrue the rights to float loans in foreign markets, to draw from foreign resources the necessary war materials and equipment and, finally, to be treated in all respects as equal belligerents in accordance with the laws of war.<sup>10</sup> By and large, the whole transaction militates heavily in favour of the insurgents. It may be expected, therefore, that, as a rule, the established government would be reluctant to acknowledge such a change. Nothing but the irresistible force of circumstances can persuade it to take such a step.

Where a case does arise in which an established government recognises the belligerency of its insurgent subjects, how far and

<sup>8</sup> See, however, *Tatem v. Gamboa* [1938] 3 All E.R. 135, 139, where it was held by Goddard J. that 'I do not know of any doctrine in international law which enables one side in a civil war to establish a blockade, or to declare a blockade, unless, of course, the other governments recognised them, and grant belligerent rights'.

<sup>9</sup> Secretary Gresham to Thompson, January 11, 1894, regarding the Brazilian revolt (Moore, *Digest*, vol. 2, p. 1114).

<sup>10</sup> See *Dana's Wheaton*, s. 23, n. 15.

in what manner will the rights and duties of the parties concerned be affected?

Oppenheim is of the view that acts of recognition by the established government or by third States are not binding on each other. He explains:

‘ Since, however, recognition may be granted by foreign States independently of the attitude of the legitimate Government, and since recognition granted by the legitimate Government is not binding upon foreign Governments, it may happen that insurgents are granted recognition by the legitimate Government while foreign States refuse it, and *vice versa*. In the first case, namely, recognition of the insurgents by the legitimate Government but not by foreign Governments, the rights and duties of neutrality devolve upon foreign States, as far as the legitimate Government is concerned. Its men-of-war may visit and search their merchantmen for contraband; a blockade declared by it is binding upon them; and the like. But no rights and duties of neutrality devolve upon foreign States as regards the insurgents. A blockade declared by them is not binding, and their men-of-war may not visit and search merchantmen for contraband. On the other hand, if insurgents are recognised by a foreign State but not by the legitimate Government, that foreign State has all the rights and duties of neutrality so far as the insurgents are concerned, but not so far as the legitimate Government is concerned ’.<sup>11</sup>

This opinion is obviously self-contradictory. If the recognition by the established government cannot ‘ bind ’ foreign States, there is no reason why foreign States should observe the obligations of neutrality, even towards the established government alone. On the other hand, if the third State is bound by the recognition by the established government to observe neutral duties towards it, the result would be contrary to Oppenheim’s positivist doctrine that one State cannot impose duties on another without the latter’s consent. It would also lead to the absurdity of foreign States observing ‘ neutral ’ duties in a war where there is *one* belligerent.

This criticism may also be made of the Resolution of the Institute of International Law, 1900, Article 5 (1) of which reads:

<sup>11</sup> Oppenheim, vol. II, pp. 521-2.

'A third Power is not bound to recognise insurgents as belligerents merely because they are recognised as such by the Government of the country in which civil war has broken out.'<sup>12</sup>

Here the Resolution deals only with the effect of recognition by the established government upon third States, and not *vice versa*. Third States are not bound to recognise the insurgents as belligerents, but nothing is said about the right of the established government to assume belligerent status. The same one-sidedness also occurs in Article 5 (2), where it is stated that a non-recognising foreign State is not required to respect the blockade instituted by the insurgents. There is no mention of the blockade instituted by the established government. It seems that, as far as this Resolution is concerned, the question of the relations between the established government and the non-recognising foreign State remains an open one.<sup>13</sup>

Sir Arnold McNair, in defence of the view criticised above, argues that the opposing theory would be to enable the established government to release itself from the responsibility for future acts of the rebels, and to invest itself and the rebels with rights against third States without consulting their wishes.<sup>14</sup>

Regarding the first point, we have shown that responsibility for the acts of rebels does not as a rule devolve upon the established government after the suppression of the rebellion.<sup>15</sup> In spite of some views expressed to the contrary,<sup>16</sup> Professor Lauterpacht confidently, and, it is believed, with justice, maintains that 'there is no warrant for the opinion that, normally, the lawful government is responsible for acts of the insurgents or for losses suffered by foreigners as the result of the insurrection',<sup>17</sup> and that

<sup>12</sup> Scott, *op. cit.*, p. 158.

<sup>13</sup> See the interpretation that third States are nevertheless bound to respect the belligerent rights of the lawful government (Lauterpacht, p. 201).

<sup>14</sup> McNair, *loc. cit.*, p. 477.

<sup>15</sup> Above, p. 332.

<sup>16</sup> Phillimore, *op. cit.*, n. 21, p. 15 above, vol. II, p. 24; Hall, pp. 36-7 (but see contrary view at p. 274); Rougier, *op. cit.*, n. 2, p. 97 above, p. 220; Goebel, *The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil War*, 8 A.J.I.L., 1914, p. 802; Wehberg, *loc. cit.*, n. 15, p. 356 above, p. 99; Institute of International Law, Resolutions of 1927, Article 7 (1), 22 A.J.I.L., 1928, Special Supplement, p. 331; other authorities cited in Lauterpacht, p. 248.

<sup>17</sup> Lauterpacht, p. 247. Accord, Fiore, *op. cit.*, n. 25, p. 15 above, Article 333; Borchard, *op. cit.*, n. 61, p. 129 above, p. 229; Berlia, *La Guerre Civile et la Responsabilité Internationale de l'Etat*, 54 R.G.D.I.P., 1937, p. 51; [Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 241-2. See also the *Home Missionary*



'international law does not postulate the organised and semi-permanent character of insurgency, evidenced by recognition of belligerency, as a condition of the absence of liability on the part of the lawful government'.<sup>18</sup>

Sir Arnold McNair's second argument is logically unassailable, if we accept the positivist hypothesis. It is more thoroughgoing than Oppenheim's argument that recognition by the established government may impose neutral duties on third States, at least towards the established government. Here it is denied that the recognition by the established government can even do that. Recognition by the established government can merely affect its relations with insurgents. Presumably, recognition by third States can also only affect their relations with the insurgents. Under such a theory there would be no avenue through which a belligerent-neutral relation could be created between the established government and third States, except, perhaps, by agreement. This situation is described as absurd and unjust by Rougier.<sup>19</sup>

If recognition by the established government cannot create a belligerent-neutral relation between itself and third States, still less can it create such a relation between third States and the insurgents.<sup>20</sup>

It is evidently a logical impossibility, starting from a positivist hypothesis, to arrive at a conclusion according to which recognition by the established government can create neutral duties for

*Society* case (1920), in which the British-American Claims Arbitral Tribunal declared that 'it is a well-established principle of international law that no government can be held responsible for the acts of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection' (15 A.J.I.L., 1921, p. 294, at p. 296).] In a directive for the negotiation of the Treaty of Washington, 1871, the United States claimed non-liability for rebels in localities where they exercised 'superior force'. The recognition by Britain was not advanced as a ground for non-liability (Moore, *International Arbitrations*, vol. I, p. 684). Harvard Research, *Responsibility of States* (33 A.J.I.L., 1939, Special Supplement, p. 133), provides that the State is not liable, if there is no lack of due diligence (Article 12, at p. 193). Recognition of belligerency makes that non-liability absolute (Article 13, at p. 195).

<sup>18</sup> Lauterpacht, p. 249. See also *Prats v. U.S.* decided by U.S.-Mexican Claims Com. (Moore, *International Arbitrations*, vol. 3, pp. 2886, 2896; above, p. 344).

<sup>19</sup> Rougier, *op. cit.*, pp. 227-8.

<sup>20</sup> Rougier suggests that the recognition by the established government creates the sovereignty of the belligerent community and third States must respect the latter's rights as a delegation by the established government (*op. cit.*, p. 229). This seems to be bordering on the absurd. How can it explain the recognition by third States?

third States either towards itself or towards the insurgents. The solution must be sought from the view that the rights and duties between belligerents and neutrals arise directly from the operation of law consequent upon the existence of the fact of war. Recognition by the established government is almost conclusive evidence that such a war exists. For no government would be willing to place a domestic struggle on the plane of international law, unless the situation is really out of hand. When the established government has made clear that the war will have to be fought according to the law of nations, third States are in fact offered, as in an international war, the choice between taking sides or remaining neutral. If they decide to remain neutral, they are subject to the laws of neutrality.<sup>21</sup> The parties are thus subjected to a régime of war not through the imposition of any one party, but through the operation of the law.

On the question whether the established government has a right to recognise the belligerency of the insurgents and thereby invest itself with belligerent rights against third States, Professor Lauterpacht is strongly in favour of an affirmative answer and brings forward an abundance of material in support of this view. It is an unanswerable argument that 'the right to wage war is, in the absence of obligations to the contrary, an undoubted right of the State', and that 'it does not lie with outside States to deny to it that right'.<sup>22</sup> It is immaterial against what adversary the war is being waged.<sup>23</sup> Such a right has, with few exceptions,<sup>24</sup> been uniformly admitted by third States, whenever it has been asserted. A few outstanding cases may be mentioned to illustrate the uniformity of the practice.<sup>25</sup>

British practice has been consistently to respect the blockade instituted by the established government against rebel ports. Thus during the St. Domingo revolt in 1864, the British Government was advised by the Law Officers that a notification of blockade of the Dominican ports by Spain necessarily implied the existence of war.<sup>26</sup> Again, during the Carlist War of 1874 in Spain, the

<sup>21</sup> See Twiss, *op. cit.*, n. 26, p. 15 above, vol. II, s. 239.

<sup>22</sup> Lauterpacht, p. 194.

<sup>23</sup> Twiss, *op. cit.*, vol. II, s. 239.

<sup>24</sup> See the case of the Spanish Civil War, 1936-1939, below, p. 377 *et seq.*

<sup>25</sup> For further examples, see Lauterpacht, p. 193 *et seq.*

<sup>26</sup> Smith, vol. I, pp. 313-7.

British Government took the view that if the blockade proclaimed by the Serrano Government was effective, that blockade would exist both *de facto* and *de jure*, and that consequently 'the Carlists henceforth become belligerents'.<sup>27</sup>

In the course of the controversy over the British recognition of the belligerency of the Confederacy, the British Government<sup>28</sup> justified its action on the ground that the Proclamation of Blockade by President Lincoln on April 19, 1861, had already established the existence of the war.<sup>29</sup>

In a letter to Lord Lyons, July 19, 1861, Lord Russell declared that 'Her Majesty's Government do not intend to dispute the rights of blockade on the part of the United States with regard to the ports in the possession of the Confederate States', but such a blockade must be an exercise of war right.<sup>30</sup>

During the controversy that followed, the United States Government did not contradict the British view as to the effect of the blockade. It based its contention rather upon the pre-conceived unfriendly attitude of the British Government, as was shown by the fact that it had already formed its decision to recognise the Confederacy before it had received complete knowledge of the American Proclamation.<sup>31</sup>

Summing up the situation, Hall concludes:

'The Government of the United States had recognised the belligerent character of the Southern Confederacy by proclaiming a blockade, that being a measure the adoption of which admitted the existence of war, in rendering foreign ships liable to penalties illegal except in time of war.'<sup>32</sup>

The right of the established government to exercise belligerent rights has been strongly upheld by the United States Supreme Court. In *The Prize Cases* (1862) it was held that a nation should have the right to meet a rebellion by the exercise of belligerent powers, in which neutrals are bound to acquiesce. Where a civil war exists and official recognition is given by the

<sup>27</sup> Smith, vol. I, p. 321.

<sup>28</sup> Opinion of the Law Officers, February 14, 1867, quoted at p. 358 above.

<sup>29</sup> For the text of the American Proclamation, see Bernard, *op. cit.*, n. 12, p. 107 above, pp. 78-80. For the text of the British Proclamation, see *ibid.*, p. 135; also 51 B.F.S.P., 1860-1861, p. 165.

<sup>30</sup> 51 B.F.S.P., 1860-1861, p. 206.

<sup>31</sup> See Moore, *International Arbitrations*, vol. 1, p. 563.

<sup>32</sup> Hall, pp. 44-5.

sovereign, it is held, 'a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals'.<sup>33</sup>

It is abundantly clear that, both in theory and in practice, recognition of insurgents as belligerents by the established government has the effect of placing the relations between that government and foreign States upon the basis of the international law of war and neutrality. This is really another way of stating a more general proposition that the existence of a war, as evidenced by the action of the established government, brings about legal consequences binding upon all parties concerned. In the light of this general principle, the events occurring during the Spanish Civil War in 1936-1939 must be considered as exceptions to the rule.

On August 9th and 11th the Spanish Government published two decrees proclaiming that certain territories occupied by the insurgents were to be 'considered as war zones and subject to blockade'. Since it is not competent to a State to close by municipal decree a port in the hands of insurgents,<sup>34</sup> the Spanish decree was evidently issued in pursuance of international law.<sup>35</sup> The British and the United States Governments did not contest in principle the right of the Spanish Government to establish a blockade. From these facts, some writers on international law drew the conclusion that the right of the Spanish Government to establish a blockade *jure gentium*, and thereby to place the conflict upon an international law basis, had been admitted.<sup>36</sup>

On the other hand, the British<sup>37</sup> and other governments steadfastly denied that either side was entitled to belligerent rights. This position was expressly maintained in the Preamble of the Nyon Agreement.<sup>38</sup> Sir John Simon's statement in the House of

<sup>33</sup> 2 Black 635, 669. See also *Dana's Wheaton*, s. 296, n. 153; the cases of *The Tropic Wind* (1861), printed in 51 B.F.S.P., 1860-1861, pp. 207, 210-11 and *The Amy Warwick* (1862), 2 Black 635, 2 Sprague 123, quoted in Bernard, *op. cit.*, p. 98.

<sup>34</sup> See below, p. 385.

<sup>35</sup> For the view that the Spanish decree was only a closing of ports, see Padelford, *op. cit.*, n. 71, p. 346 above, pp. 9-12.

<sup>36</sup> Smith, *loc. cit.*, n. 4, p. 308 above, p. 27; Garner, *loc. cit.*, n. 73, p. 347 above, p. 72.

<sup>37</sup> See statement of the Foreign Secretary in the House of Commons, December 8, 1937 (Parl. Deb., H.C., 5th ser., vol. 357, col. 330).

<sup>38</sup> Signed on September 14, 1937, with a Supplementary Agreement signed on September 17 (31 A.J.I.L., 1937, Supplement, p. 179).

Commons, April 14, 1937, was an unqualified denial of the right of the Spanish Government to assert belligerent status:

‘I never said, and the British Government never said, that when the Spanish Government, which was not recognised as engaged as a belligerent, took upon itself to say that it would endeavour to establish a *de facto* blockade, the blockade was admitted to be lawful. . . . When one says that belligerent rights are not admitted or conceded, that applies to both sides. There is no more right in a government that is fighting a civil war to interfere as belligerents with ships on the high seas because they are a government, than there is such a right on the part of insurgents.’<sup>39</sup>

Apart from the exceptional circumstances of the Spanish Civil War, 1936-1939, the right of the established government to assert belligerent rights against third States may be said to be generally admitted. How far does this action affect the relations between third States and the insurgents? The answer given by Oppenheim and the Institute of International Law, as we have seen,<sup>40</sup> is an unqualified negative. If it be assumed that an unrecognised insurgent body has no international status, then logically such an insurgent body can claim no neutral duty from a third State which has not recognised it. The recognition by the established government cannot impose a neutral duty on the third State on behalf of the insurgent body by means of its own action of recognition.<sup>41</sup> Yet, on the other hand, if it be assumed that the recognition by the established government creates belligerent-neutral relations between itself and third States, it would be absurd for third States to be free to disregard neutral duties towards the insurgents. As war is an armed contention between at least two parties, one belligerent does not constitute a war.<sup>42</sup> Oppenheim defines ‘neutrality’ as ‘the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents’.<sup>43</sup> The idea that a third party can be ‘neutral’ to one contending

<sup>39</sup> Parl. Deb., H.C., 5th ser., vol. 322, col. 1039. This view was adopted in *Tatem v. Gamboa* [1939] 1 K.B. 132 (above, p. 371). But see *Robson v. Sykes* (1938) 54 T.L.R. 727, p. 347 above. [The so-called Chinese ‘blockade’ of 1949 was an attempt by the Chinese Government to close by executive order ports held by the insurgents, see below, pp. 386-7.]

<sup>40</sup> Above, pp. 372-3.

<sup>41</sup> See above, pp. 374-5.

<sup>42</sup> Jessup, *loc. cit.*, n. 1, p. 307 above, p. 273.

<sup>43</sup> Oppenheim, vol. II, p. 514.

party and not to another is utterly unthinkable. The view that it is impossible to allow one party to exercise belligerent rights without granting similar rights to the other has been almost unanimously held by writers on international law<sup>44</sup> as well as in the practice of States.<sup>45</sup> The principle is well expressed by Walker, who writes:

‘If war undoubtedly exists in fact, it (*i.e.*, the foreign State) cannot refuse to the parent State the exercise of these rights nor, if any duty of impartiality exists at all, can it deny to one side what it allows to the other. . . . War rights come from war, not from recognition.’<sup>46</sup>

A few words will suffice regarding the relations between the established government and the insurgent body which it has recognised as a belligerent. As between them, the laws of war between independent States would become applicable.<sup>47</sup> But what if either of the parties refuses to conform to these laws? The same answer to be given in the case of an international war would be valid here. The ordinary sanctions of an international war would be available—namely, reprisals by the enemy and pressure from the neutrals.

In a civil war, as in an international war, the neutrals have a great deal, if not quite as much as the belligerents, to do with the upholding of the laws of war. The failure of one belligerent party to live up to the prescribed standard of law would affect neutral interests often too profoundly for them to remain indifferent.<sup>48</sup> During the American Civil War, the Federal Government intimated that it would refuse to recognise the competence of the Confederate Prize Courts. The British Law Officers suggested

<sup>44</sup> *E.g.*, Twiss, *op. cit.*, s. 239; Bernard, *op. cit.*, p. 116; Rougier, *op. cit.*, pp. 221, 224-5; Brierly, *op. cit.*, n. 17, p. 15 above, p. 127; Wehberg, *loc. cit.*, p. 98; Smith, *loc. cit.*, p. 27; Lauterpacht, p. 201, [although in the latest edition of Oppenheim, vol. II, 1944, Professor Lauterpacht states that ‘qualified neutrality . . . while dormant in the nineteenth century, never ceased entirely to form part of the law of nations and was fully resuscitated in the Covenant of the League of Nations’ (p. 503). The traditional rules of neutrality have also been affected for members of the United Nations by virtue of their obligations under the Charter, see Lalive, *International Organisation and Neutrality*, 24 B.Y.I.L., 1947, p. 72.]

<sup>45</sup> See the numerous instances cited in Lauterpacht, pp. 187-92. See also *The Prize Cases* (1862), 2 Black 635, 669.

<sup>46</sup> Walker, *loc. cit.*, n. 19, p. 312 above, p. 205.

<sup>47</sup> Rougier, *op. cit.*, p. 223.

<sup>48</sup> See Smith, *The Law and Custom of the Sea*, 1950, p. 76.

that the neutrals should have a right to insist on the fulfilment of belligerent duties by the United States. Without reciprocity to the insurgents, they said, the war activities of the United States, 'instead of being lawful acts, are so many acts of unjustifiable violence, insult and wrong'. They suggested that a joint declaration should be issued by the neutrals to the effect that they would refuse belligerent rights to the United States, unless she would respect the belligerent status of the Confederacy.<sup>49</sup>

Having thus examined all the three phases of the consequence of recognition by the established government, we may conveniently summarise the discussions in Hall's words:

'In the second case (*i.e.*, recognition by the established government) the State puts itself under an obligation to treat its revolted subjects as enemies and not rebels until hostilities are ended, and asserts its intention on the ground of the existence of war to throw upon other countries the duties, and to confer upon them the rights, of neutrality.'<sup>50</sup>

*Recognition by third States.* Since third States have everything to lose and nothing to gain in a situation of civil war, they would normally be inclined to resist the exercise of belligerent rights against them, until they are satisfied of the justice and the inevitability of the claim. In the absence of an international court competent to decide upon the matter, a third State, whether acting upon the concession theory or acting upon the declaratory theory, would claim to judge for itself the precise moment from which the contending parties may be allowed to exercise belligerent rights against it. But in so doing, a third State does not act without restraint. For the rights and duties of neutrality arise from the fact of war. Conditions which render recognition both permissible and obligatory have already been discussed.<sup>51</sup> A third State may ignore these at its own peril. Civil war, like any other form of war, is the result of a situation in which things have come to such a pass that peoples and nations are prepared to pay the price of their blood in order to realise some political ends. Disinterested parties are obliged to choose between taking

<sup>49</sup> Smith, vol. I, pp. 305-6.

<sup>50</sup> Hall, p. 36.

<sup>51</sup> Above, p. 364 *et seq.*

part, or staying out. If they decide to stay out, they cannot avoid the consequences of neutrality.

How far does recognition by a foreign State bind the established government, other foreign States and the insurgents? Oppenheim considers recognition by a foreign State as establishing merely the belligerent-neutral relationship between the insurgent body and the recognising foreign State alone.<sup>52</sup> This is strictly logical, following, as it does, from the idea that recognition is a concession of pure grace. Even if a third State may concede belligerent rights to the established government, it cannot, under this theory, exact fulfilment of belligerent duties from it without its consent. In practice, this sort of thing does not happen. For the remedy lies in the hands of the third State. If the established government refuses to conform to the laws of war, the third State may also deny it belligerent rights while allowing them to the insurgents. The inducements for the observance of the laws of neutrality are the same as in an international war. We may again quote Hall in support of our view:

‘In the former case (*i.e.*, recognition by the foreign State) the effect is to give the belligerent community rights and duties, identical with those attaching to a State, for the purposes of its warlike operations, as between it and the country recognising its belligerent character, and also to compel the State at war with it to treat the recognising country as a neutral between two legitimate combatants, unless the good faith of the recognition can be impugned, when, as a wrong has been committed, the right accrues to obtain satisfaction by war.’<sup>53</sup>

As to the effect of recognition by a foreign State upon the relations between the contesting parties, the position is precisely the same as in the case of recognition by the established government. The recognition in either case does not guarantee that the laws of war will be faithfully observed by both sides. The same remedy would be available for the same ailment, namely, enemy retaliation and neutral pressure.

It is believed that recognition by one foreign State does not affect the relations between other foreign States on the one hand

<sup>52</sup> Above, p. 375.

<sup>53</sup> Hall, p. 36. *Accord*, Article 7 of the Resolutions of the Institute of International Law, 1900 (Scott, *op. cit.*, p. 158).



and the contesting parties on the other. So long as the States alone are competent to judge the existence of the fact of war for themselves, this result is inevitable. If there existed an international authority competent to declare upon the existence of a civil war, it would probably not then be free to any third State to deny the parties of belligerent rights. The idea is not altogether Utopian, although little practical result has yet been achieved.<sup>54</sup>

## § 2. MODES OF RECOGNITION

When a State is convinced that a state of war is in fact in existence, either within its own territory, or within that of another State, by what outward signs can its appreciation of the fact be made known to the outside world? In other words, how can its recognition be effected? The question involves the mode in which recognition is accorded, and the organ of the State from which recognition emanates.

As to the question of mode, a distinction has often been made between express and implied recognition. It is thought by some writers that, for the sake of clarity, express recognition is preferred.<sup>55</sup> Another view is that, quite apart from the question of desirability, express recognition is a more common occurrence.<sup>56</sup> On the other hand, there are those who come to exactly the contrary conclusion that express recognition is rare.<sup>57</sup> There are still others who distinguish between recognition by the established government and that by third States. It is thought that

<sup>54</sup> During the *Alabama Arbitration* (1872) the American Government brought up the question of premature recognition, but, owing to British opposition, it was not included in the term of reference for the tribunal (Moore, *International Arbitrations*, vol. I, pp. 547-53, 562-3; Smith, vol. I, pp. 308-9). Smith argues that, since the award was based upon the assumption that *The Alabama* was a duly commissioned ship of war, it must be inferred that the tribunal had rejected the American contention (*ibid.*, p. 321).

During the Spanish Civil War, 1936-1939, while there was no formal move to request the League to decide on the existence of war in Spain (Padelford, *op. cit.*, chapter IV), the proposal to end non-intervention came very close to it.

<sup>55</sup> See Westlake, *op. cit.*, n. 15, p. 15 above, vol. I, pp. 56-7; Hyde, vol. I, p. 198; Hershey, *op. cit.*, n. 15, p. 306 above, p. 204; Garner, *loc. cit.*, n. 73, p. 347 above, p. 71; Padelford, *loc. cit.*, n. 82, p. 348 above, pp. 235-6.

<sup>56</sup> See President McKinley's message of December 6, 1897 (Moore, *Digest*, vol. I, p. 199). See also Secretary Blaine to Attorney-General, March 18, 1889 (*ibid.*, p. 201); Benedict, J., in *The Conserva* (1889), 38 Fed. Rep. 431, 437 (*ibid.*).

<sup>57</sup> See Oppenheim, vol. II, p. 199; Lauterpacht, p. 177; Smith, *loc. cit.*, n. 4, p. 308 above, pp. 17, 21.

recognition by foreign States should be explicit, while recognition by the established government may be implied.<sup>58</sup> There is yet another view which denies altogether the need of any overt act to bring about the consequences of recognition. In a note to the Peruvian Minister, the United States Secretary of State Cass wrote:

‘ By what public act, whether proclamation or otherwise, this recognition must take place I have not found laid down. I am not aware that in this country any solemn proceeding, either legislative or executive, has been adopted for the purpose of declaring the status of an insurrectionary movement abroad, and whether it is entitled to the attributes of civil war, . . . Whether a civil war was prevailing in Peru is a question of fact, to be judged by the proofs, as the existence of a war between two independent nations is a similar question, to be determined in the same manner, whereas, as is often the case, at least in this country, there is no public authoritative recognition of it.’<sup>59</sup>

These differences of opinion are due partly to the lack of agreement in the meaning of the words ‘ express ’ and ‘ implied ’, and partly to the difference in the importance that is attached to the act of recognition. Generally speaking, to exact a greater degree of explicitness is more consistent with the concession theory, which is naturally inclined to make the implication of recognition more difficult; whereas to regard recognition as the simple adoption of an attitude of impartiality on the part of third States and the assumption of belligerent status on the part of the established government is more in accord with the declaratory theory. This difference of view accounts for numerous controversies in the determination of whether, in a given case, recognition has been accorded.

We shall now examine the various acts which at one time or another have been regarded as signifying recognition.

*Proclamation of the recognition of belligerency, or proclamation of neutrality.* These proclamations give rise to least dispute. In the strictest sense, they are the only acts which may be said to amount to ‘ express recognition ’. Proclamations of neutrality

<sup>58</sup> Hall, pp. 42-3; Rougier, *op. cit.*, n. 2, p. 97 above, pp. 202, 399.

<sup>59</sup> Cass to Osma, May 22, 1858 (Moore, *Digest*, vol. I, 182-3). See also his letter to Clay, November 26, 1858 (*ibid.*, p. 183, cited above, p. 342).

by third States are rare.<sup>60</sup> The Act of the United States Congress of July 13, 1861, is reputedly the unique example of recognition by the established government by means of a proclamation of recognition.<sup>61</sup>

*Proclamation of blockade.* Majority opinion in both theory and practice is in favour of the view that a declaration of blockade by the established government, being an assertion of belligerent status, may be regarded as recognition of belligerency. Thus writes Rougier :

‘ *Le blocus, en effet, est un droit belligérant qui suppose nécessairement un état de guerre; décréter le blocus, c’est proclamer l’existence d’une guerre. . .* ’<sup>62</sup>

British practice in this matter has been fairly uniform.<sup>63</sup> During the insurrection of St. Domingo against Spain, the British Law Officers urged that, the Spanish Government having issued a notification of blockade, ‘they virtually asserted, by that very act, the existence of such a State of War’.<sup>64</sup> In numerous instances the British Law Officers consistently maintained that the institution of blockade by the established government against the insurgents constituted recognition of belligerency.<sup>65</sup>

A declaration of blockade must not be confused with a decree

<sup>60</sup> *E.g.*, the proclamation of June 7, 1821, by the Ionian Senate in connexion with the Greek rebellion (Smith, vol. I, p. 281); the British (May 13, 1861), French (June 10, 1861), Spanish (June 17, 1861) and Hawaiian (August 26, 1861) proclamations of neutrality during the American Civil War (Bernard, *op. cit.*, n. 12, p. 107 above, pp. 135, 144, 147, 149); the proclamation of the United States during the Texan rebellion against Mexico (Moore, *Digest*, vol. I, p. 176); recognition of the Cuban rebellion by Peru in 1869 and the recognition of the Chilean revolt by Bolivia in 1891 (Rougier, *op. cit.*, p. 400). In an opinion of August 14, 1867, regarding the Cretan insurrection, the British Law Officers stated that the promulgation of a Proclamation of Neutrality might be ‘a public recognition of the insurgents as Belligerents’ (Smith, vol. I, p. 265).

<sup>61</sup> *The Prize Cases* (1862), 2 Black 635, 695; Rougier, *op. cit.*, p. 202. It is questionable whether this may be considered as an act of recognition, since the recognition had already taken place at the time of the proclamation of blockade by President Lincoln, on April 19, 1861.

<sup>62</sup> Rougier, *op. cit.*, p. 205. *Accord*, Wehberg, *loc. cit.*, n. 15, p. 356 above, r 94; Lauterpacht, p. 199.

<sup>63</sup> See Lauterpacht, pp. 178, 194. By an Act of 1776 (16 Geo. III, c. 5) England proclaimed a blockade of the American coasts. Little notice, however, seems to have been taken of it by the United States in her claim for belligerent rights.

<sup>64</sup> Opinions of August 22, and November 22, 1864 (Smith, vol. 1, pp. 313, 317).

<sup>65</sup> *E.g.*, in the American Civil War (see above, p. 376); in the revolt of Venezuela, 1871 (Lauterpacht, p. 202); in the revolt of Haiti, 1876 (*ibid.*, p. 210) and in the Carlist War in Spain (*ibid.*, pp. 208-9).

of closure, the latter being a municipal decree, without the consequence of recognition.<sup>66</sup> A decree of closure cannot be issued in time of insurrection when the ports in question are in the hands of the insurgents. The principle is expressed in the often quoted statement of Lord John Russell in the House of Commons on June 27, 1861, with reference to the decree of closure of the Government of New Granada. He said:

‘ . . . it was perfectly competent to the government of a country in a state of tranquillity to say which ports should be open to trade, and which should be closed. But in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and that such a proceeding would be an invasion of the international law relating to blockade.’<sup>67</sup>

The principle is clear that in time of insurrection a port in the hands of insurgents cannot be lawfully closed to foreign commerce except in the exercise of the belligerent right of blockade. The established government issuing a decree of closure would find itself in the predicament of having either to meet the resistance of foreign States or to admit that it is in exercise of a belligerent right, in which case it would amount to a recognition of belligerency. It is not clear from the above quotation whether the prohibition against municipal closure merely implies that the established government is not permitted

<sup>66</sup> For distinctions, see Twiss, *op. cit.*, n. 26, p. 15 above, s. 239.

<sup>67</sup> Parl. Deb., 3rd ser., vol. 163, col. 1645. See to the same effect: opinion of Law Officers, June 25, 1861, concerning blockade of the Confederate coasts (Lauterpacht, p. 215); opinion of July 16, 1883, concerning the Haitian revolution (*ibid.*, p. 211); opinion of 1889 concerning the revolution in Peru (*ibid.*, p. 218); statement by Secretary Bayard to the Minister of Colombia, April 24, 1885 (Moore, *Digest*, vol. VII, p. 808); Bayard to Mason, December 20, 1886 (*ibid.*, p. 814); Bayard to Thompson, 1889 (*ibid.*); Earl of Derby to Lord Odo Russell, January 17, 1876 (*ibid.*, p. 807); British and German opposition to decree of President Balmaceda of Chile, April 1, 1891 (*ibid.*, p. 815); view of Bismark as reflected in *North German Gazette* (*ibid.*, p. 817); the case of *Cie. Générale des Asphaltes de France* (1903), before the British-Venezuelan Mixed Commission (*ibid.*, p. 820; Ralston, *op. cit.*, n. 92, p. 328 above, p. 331); *Orinoco Asphalt Co.* (1903) case before the German-Venezuelan Mixed Commission (Moore, *ibid.*, p. 820; Ralston, *op. cit.*, p. 586); action of the Powers during the Dominican revolutions of 1903 and 1914 (Hackworth, vol. I, p. 360, vol. VII, p. 127); attitude of the United States during Mexican revolution, 1912 (*ibid.*, vol. I, pp. 142-3, vol. VII, p. 166); Nicaraguan revolution, 1910 (*ibid.*, vol. VII, p. 127); Haitian revolution, 1914 (*ibid.*), and Brazilian revolution, 1932 (*ibid.*, p. 168). Supported in principle in the *Oriental Navigation Co.* case (1928) before the United States-Mexican Claims Commission (*Opinions of the Commissioners*, 1929, p. 24, 23 A.J.I.L., 1929, p. 434). See comments in Dickinson, *The Closure of Ports in Control of Insurgents*, 24 A.J.I.L., 1930, p. 69.

to interfere with foreign shipping on the high seas, or whether the interference within the territorial waters of the disturbed State is also disallowed. Reason seems to demand that the latter view be adopted.<sup>68</sup> There are, however, instances in which the more restricted view has been taken.<sup>69</sup> This seems to be the position taken by the foreign Powers during the Spanish Civil War, 1936-1939.<sup>70</sup> But the anomaly in this case is that the established government was not allowed the choice between limiting its activities within territorial waters and extending them beyond that limit by means of establishing a blockade *jure gentium*. The argument of the foreign States was that a State cannot close an insurgent port except by means of an effective blockade,<sup>71</sup> but the belligerency of either party not being recognised, such a blockade could not be established.<sup>72</sup> The position of the powers was obviously inconsistent with principle and precedent.<sup>73</sup>

[A similar situation arose during the civil war in China. In June, 1949, the Chinese Government issued an order closing a specified region to foreign vessels. This region comprised the area of coast held by the Chinese insurgents, and as the rebels secured control of more of the coast the scope of the order was correspondingly increased. Neither the British nor American Government would recognise this order as constituting a blockade, which would have meant the belligerent recognition of the rebels, nor were they prepared to assist their merchantmen in running the 'blockade', although the Royal Navy afforded protection to British vessels to the limit of territorial waters. This attitude is easily understood in view of the Chinese action pur-

<sup>68</sup> See the dictum of the U.S.-Mexican Claims Commission in the *Oriental Navigation Co.* case (1928), quoted above, p. 345.

<sup>69</sup> See the opinions of the British Law Officers, July 1, 1870 (Lauterpacht, p. 216); September 4, 1866 (*ibid.*, p. 219); August 5, 1869 (*ibid.*, p. 220). In an opinion of August 13, 1870, concerning the revolt in Venezuela, it was curiously suggested that the closure must be respected unless the ports 'are not only not in the Possession, but also not under the Dominion of the Republic' (*ibid.*, p. 221).

<sup>70</sup> This is what Sir Arnold McNair has termed 'quasi-blockade' (McNair, *loc. cit.*, n. 86, p. 349 above, pp. 488-90). See also U.S. Naval War College, *International Law Situation*, 1938, pp. 94-96 (Hackworth, vol. VII, pp. 168-9).

<sup>71</sup> See Secretary Hull's instructions to United States Embassy at Madrid (Hackworth, vol. VII, p. 168).

<sup>72</sup> See McNair, *loc. cit.*, pp. 488, 490; Padelford, *op. cit.*, n. 71, p. 346 above, pp. 10-2; same, *loc. cit.*, n. 82, p. 348 above, p. 231.

<sup>73</sup> A feeling of dismay is reflected in the U.S. Naval War College, *International Law Situations*, quoted in Hackworth, vol. VII, p. 169.

porting to close by executive order ports under insurgent control, the order having been described by the Chinese 'as enforceable independently of a declaration of blockade, which has never been, and is not, under the contemplation of the Chinese Government'.<sup>74</sup>]

*Proclamation of the enforcement of 'neutrality legislation'.* The so-called 'neutrality legislation' is of three types. The first type forbids only the rendering of assistance to rebels, while no restriction is placed upon rendering assistance to the established government. Because of this inequality of treatment, the enforcement of such legislation does not have the effect of recognition, and, indeed, it even seems to be a misnomer to call it 'neutrality' legislation.<sup>75</sup> Section 5283 of the Revised Statute of the United States seems to fall under this head. It prohibits persons from taking part in hostilities in service 'of any foreign prince or State, or of any colony, district or people' against 'the subjects, citizens, or property of any foreign prince or State, or of any colony, district or people *with whom the United States are at peace*' (italics added). The descriptive words 'with whom the United States are at peace' refer only to the party against whom the hostilities are directed. It is only necessary that the object of attack be a body with legal status with whom the United States are at peace; the character of the body in whose service the

<sup>74</sup> [*The Times*, June 20, 25, July 2, August 25, 26, September 13, December 19, 24, 30, 1949. United States Information Service, *Daily Wireless Bulletin*, No. 1012, June 26, No. 1019, July 2, 1949; *News Chronicle*, July 7, *Glasgow Herald*, July 18, 1949. In November, 1949, the Chinese Nationalist Government announced its intent to bomb neutral merchant ships in Chinese territorial waters making for Communist-held ports. The British Government warned the Chinese Government that it would regard any such attack as illegitimate and unfriendly, and that it would hold the Chinese Government responsible for the consequences (*The Times*, November 5, 1949). Similarly, when an American vessel was shelled near the mouth of the Yangtze the State Department protested to the Nationalists (*The Times*, November 17, 1949), but when it was announced that the Nationalists had mined the approaches to Communist-held ports, the mines having been laid in territorial waters, the State Department warned the masters of American ships that they might lose their licences if they tried to run the 'blockade' (*The Times*, December 24, 30, 1949).]

<sup>75</sup> Such a law may be applied to cases where both contesting parties are States or recognised belligerents, or where only the object of hostilities is a State or a recognised belligerent. In the latter case, as the protection is given to one side only, there is, and can be no 'neutrality'. See communication from Secretary Bayard to the Spanish Minister, July 31, 1885 (U.S. For. Rel., 1885, p. 776; Dumbauld, *Neutrality Laws of the United States*, 31 A.J.I.L., 1937, p. 258, at p. 260). See also below, p. 401.

accused is employed is immaterial.<sup>76</sup> This view is fully borne out by the judgment in *The Three Friends* (1897), in which Fuller C.J. said, 'If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.'<sup>77</sup>

In the case of *The Lucy H.* (1915)<sup>78</sup> an American schooner was charged with a violation of Section 23 of the Penal Code of 1910<sup>79</sup> under a provision substantially the same as above. It was argued by the defendant that the régime against which the vessel was to be employed was an insurrectionary force, falling short of the description of 'foreign prince or State, or . . . any colony, district or people with whom the United States are at peace'. The defence was, however, overruled. The court seems to have relied, wrongly, upon the Supreme Court decisions in *Wiborg v. U.S.* (1896) and *The Three Friends* (1897), because in these two cases the question only involved the status of the party in whose service the accused was employed. There was no decision on the question whether it was necessary that the object of hostilities should possess international status. This necessity of discrimination between the two parties is evident from the *dictum* of Fuller C.J., quoted above.

The second type of legislation is one which is applicable to a case in which both the contesting parties are States or recognised belligerents. The application of such legislation to an entity presupposes the legal status of that body. To this type belongs the American Neutrality Act of 1794.<sup>80</sup> In *Gelston v. Hoyt* (1818)<sup>81</sup> it was held by the United States Supreme Court that, since neither

<sup>76</sup> The words 'or of any colony, district or people' were inserted in the original law of June 5, 1794, by the Act of 1817, carried forward by the Act of 1818 and so into Section 5283. The addition was effected as the result of the request of the Portuguese Minister, so as to make it applicable to cases of insurrection in which the belligerency of the insurgents is not recognised (*The Three Friends* (1897), 166 U.S. 1, 53). For the text of Act of 1818, see Phillimore, *op. cit.*, n. 21, p. 15 above, vol. I, p. 667.

<sup>77</sup> At p. 63, see similar view in Bayard's communication, above, r. 75. See also *Wiborg v. U.S.* (1896), 163 U.S. 632; and *Gayon v. McCarthy* (1920), 252 U.S. 171. Noël-Henry, *op. cit.*, n. 29, p. 139 above, s. 110) thinks that the decision of the U.S. Supreme Court in *U.S. v. Palmer* (1818), 3 Wheat. 610 also supports this view. However, in this case the Neutrality Act was not in issue. The recognition of belligerency by the Government had decided the question of the status of the insurgents (at p. 635).

<sup>78</sup> (1915) 235 Fed. 610, N.D. Fla.; Hackworth, vol. I, pp. 358-9.

<sup>79</sup> 35 Stat. 1090; 18 U.S.C., s. 23.

<sup>80</sup> See above, n. 76.

<sup>81</sup> (1818) 3 Wheat. 246.

faction in St. Domingo was judicially recognisable as 'any foreign prince or State', Ch. 50, s.3, of the Act was not applicable to the case.<sup>82</sup>

The third type is one which is applicable to a case in which neither of the contesting parties need be a State or a recognised belligerent. An example may be found in the British Foreign Enlistment Act of 1819,<sup>83</sup> which was later replaced by the Act of 1870.<sup>84</sup> Such laws are broad enough to cover any case of participation in hostile activities by British subjects either for or against bodies who may have no international status. The Act of 1819 was applied to a ship in the service of the unrecognised Cuban insurgents,<sup>85</sup> and the Act of 1870 was applied to a raiding party on the territory of a foreign State.<sup>86</sup> The application of these laws does not presuppose the recognition of belligerency.

However, there are two points which may place doubts upon such a conclusion. First, with regard to the Act of 1870, what should be the interpretation of the words 'at war' and 'at peace'? Can Her Majesty be 'at peace' with someone who does not possess a legal entity? The Judicial Committee of the Privy Council ingeniously suggested that 'at peace' means 'not at war'.<sup>87</sup>

But what about the term 'at war'? If there is a 'war' between the contesting parties which is recognisable by the court, then the parties would, for that very reason, be recognised belligerents. The question has therefore been raised whether, by proclaiming the enforcement of the Act, the British Government had not recognised the Civil War in Spain on January 10, 1937.<sup>88</sup>

<sup>82</sup> At p. 324. See comments in Jaffe, *op. cit.*, n. 21, p. 15 above, pp. 135-7.

<sup>83</sup> 59 Geo. 3, c. 69. It is provided in the Preamble that no British subject may without His Majesty's licence take part in 'warlike operations in or against the Dominions or territories of any Foreign Prince, State, Potentate, or Persons exercising or assuming to exercise the Powers of Government in or over any Foreign Country, Colony, Province, or Part of any Province, or against Ships, Goods, or Merchandise of any Foreign Prince, State, Potentate, or Persons as aforesaid, or their subject'.

<sup>84</sup> 33 and 34 Vict., c. 90. Sections 4 and 5 provide for penalties for persons participating in a foreign strife in the service of 'any foreign State at war with any foreign State at peace with Her Majesty'. By the interpretation clause in s. 30, these provisions are made to cover the same matters as the Act of 1819.

<sup>85</sup> *The Salvador* (1870), L.R. 3 P.C. 218, 233.

<sup>86</sup> *Reg. v. Jameson* [1896] 2 Q.B. 425.

<sup>87</sup> *The Salvador*, at p. 230.

<sup>88</sup> Sir Arnold McNair argues that the 'war' may be proved by evidence, in the absence of recognition (McNair, *loc. cit.*, pp. 495-6). But this begs the question whether such a 'war' is a war in the legal sense.



The second point is that the British Acts contain an element of impartiality, which is the essence of neutrality. By treating the established government on an equal footing with the rebels, a third State would be in fact assuming a duty of neutrality. In 1867, the British Law Officers were of opinion that a proclamation invoking the Act of 1819 would amount to a public recognition of the belligerency of the Cretan insurgents.<sup>89</sup> Even though the British Proclamation of June 6, 1828, was deliberately worded so vaguely as not to mention any particular civil strife,<sup>90</sup> it was held by some authorities that the Greek insurgents were thereby recognised.<sup>91</sup>

This element of impartiality is also found in numerous legislative acts of the United States, such as the Joint Resolution of Congress, January 8, 1937, prohibiting the export of arms to Spain,<sup>92</sup> the Neutrality Act of May 1, 1937<sup>93</sup> and the proclamations issued thereunder.<sup>94</sup> In cases where the legislation empowers the executive to use discretion in the application of the law, such as in the Joint Resolution of Congress, March 14, 1912,<sup>95</sup> it would seem that, until equal treatment is accorded, no recognition can be attributable to the application of such legislation.<sup>96</sup>

Apart from this last-mentioned circumstance, it is debatable whether, by declaring the enforcement of 'neutrality' legislation which provides for an attitude of impartiality, a third State does not impliedly admit the existence of two equal belligerents.<sup>97</sup>

<sup>89</sup> Opinion of August 14, 1867 (Smith, vol. I, p. 262).

<sup>90</sup> See *ibid.*, p. 288.

<sup>91</sup> See Canning to Lord Strangford, July 12, 1823 (*ibid.*, p. 289); the opinion of Lushington (*ibid.*, p. 297); the view of Smith (*ibid.*, p. 297); *contra*, Lauterpacht, p. 178. See, however, *De Wütz v. Hendricks* (1824), 2 Bing. 314, in which the right of Greek insurgents to raise loans in England was denied. Best C.J. said that no right of action could arise out of 'engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government' (at p. 316). The effect of the British Proclamation of June 6, 1823, was apparently ignored.

<sup>92</sup> 31 A.J.I.L., 1937, Supplement, p. 102.

<sup>93</sup> *Ibid.*, p. 147.

<sup>94</sup> *E.g.*, the Proclamation of May 1, 1937 (*ibid.*, p. 156).

<sup>95</sup> Hackworth, vol. I, p. 356.

<sup>96</sup> See the case of the Brazilian revolution, where the embargo was applied to the insurgents alone (Hackworth, vol. I, pp. 325-6). See also Dumbauld, *Neutrality Laws in the United States*, 31 A.J.I.L., 1937, p. 258, at p. 265; Borchard, *Neutrality and Civil War*, *ibid.*, p. 304, at p. 305.

<sup>97</sup> For the view that it does not imply recognition, see Hackworth, vol. I, p. 356; Lauterpacht, pp. 178, 235 (but at p. 235 it is admitted that the application of neutrality legislation by the United States during the Cuban War 'secured the operation of one of the principal consequences of recognition of belligerency').

*Assertion of belligerent status by the established government or the submission to such assertions by foreign States.* Where an established government, without formal declaration, proceeds to exercise belligerent rights, and a foreign State, with equal taciturnity, proceeds to submit to the exercise of such rights, can recognition of belligerency be presumed to have taken place? The question is an extremely difficult one, for these acts are gradual, unspectacular, and often individually inconclusive. For example, during the Spanish American revolt, the British naval officers were first instructed to 'accept explanations for the irregularities' of the insurgents and to respect 'local regulations'.<sup>98</sup> By August, 1818, captures by Buenos Aires privateers began to be treated as 'the case of a Prize of War between two belligerents'.<sup>99</sup> During the Greek rebellion, the insurgents were at first permitted to board British vessels, though no blockade was yet recognised.<sup>1</sup> By January, 1823, the British navy withdrew its protection from merchantmen attempting to force the blockade.<sup>2</sup> During the Chilean revolution, 1891, the British Government, besides admitting the right of insurgents to establish a blockade, also submitted to the interception of contraband and the collection of duties by them.<sup>3</sup> During the Spanish Civil War of 1936-1939, the British Government on various occasions warned British ships from proceeding to ports 'blockaded' by the contesting parties.<sup>4</sup>

In cases like these, it is often not easy to say whether recognition has taken place, or to determine the precise moment at which it did take place.<sup>5</sup>

*Acts of foreign States implying the existence of the personality of the insurgent community.* Acts presupposing the legal personality of the insurgent body have been regarded by some writers

<sup>98</sup> Hamilton to Croker, January 3, 1815 (Smith, vol. I, p. 267).

<sup>99</sup> Opinion of Robinson, August 11, 1818 (*ibid.*, p. 275).

<sup>1</sup> Moore to Croker, July 23, 1822 (*ibid.*, p. 286).

<sup>2</sup> Same to same, January 27, 1823 (*ibid.*, p. 287).

<sup>3</sup> Moore, *Digest*, vol. II, s. 333, vol. VII, s. 1268.

<sup>4</sup> See the statement of Sir John Simon in the House of Commons, April 14, 1937 (Parl. Deb., H.C., 5th ser., vol. 322, col. 1039). [See also American reaction to Nationalist mining of Chinese territorial waters, *The Times*, December 24, 30, 1949, and n. 74 above.]

<sup>5</sup> For example, according to Beale, the Spanish-American revolution was recognised by Britain on November 27, 1817, the Greek revolution on September 30, 1825 (Beale, *loc. cit.*, n. 2, p. 364 above, p. 406): according to Smith, the dates were, February 21, 1823, and June 6, 1823, respectively (Smith, vol. I, pp. 279, 288). See also Lauterpacht, p. 182, n. 1.

as implying the existence of war.<sup>6</sup> Such acts may include the conclusion of international conventions with the insurgents,<sup>7</sup> the recognition of official acts of the insurgents,<sup>8</sup> the recognition of the insurgent flag,<sup>9</sup> the admission of insurgent ships into port,<sup>10</sup> and other semi-official intercourse with the insurgents.<sup>11</sup> Such acts are so varied and their implications depend so much upon the circumstances of the case, that it is difficult to lay down a general rule as to whether they imply recognition, although they certainly raise a strong presumption of it.

*Commercia belli between the contesting parties.* How far acts in the nature of *commercia belli* imply recognition is again a moot question. Hall and G. F. von Martens<sup>12</sup> think that no recognition is implied. Rougier maintains that such acts when done in series and with the approval of the government may be considered as constituting recognition, but this does not include acts done for humanitarian reasons.<sup>13</sup> This latter exception was particularly endorsed by the Institute of International Law.<sup>14</sup>

The argument that *commercia belli* imply recognition was vigorously advanced by Wheaton. He maintained that Great Britain, through the exercise of *commercia belli*, had conceded belligerent rights to her American Colonies.<sup>15</sup> The view was adopted by the United States Supreme Court in *U.S. v. Pacific Railroad* (1887).<sup>16</sup>

<sup>6</sup> Rougier, *op. cit.*, n. 2, p. 97 above, p. 210.

<sup>7</sup> *Ibid.* The British Government, however, denied that the conclusion of a commercial agreement with the Spanish Nationalists in February, 1937, constituted a recognition of their belligerency (Smith, *loc. cit.*, n. 4, p. 308 above, p. 28).

<sup>8</sup> E.g., the recognition of the Nationalists' visas by the Tangier Committee in 1936 (*ibid.*, p. 26).

<sup>9</sup> See Lorimer, *op. cit.*, n. 19, p. 15 above, vol. I, p. 151. See, however, the contrary view of the United States concerning the recognition of Cuba by Mexico (Davis to Phelps, October 14, 1869, Moore, *Digest*, vol. I, p. 194).

<sup>10</sup> For the treatment of ships of the Spanish-American Provinces, see Dallos to Duplessis, July 3, 1815 (Moore, *ibid.*, p. 170). For the treatment of Confederate ships in Russia, Prussia and Cuba, see 51 B.F.S.P., 1860-1, p. 99; Moore, *Digest*, vol. I, p. 169; Bernard, *op. cit.*, n. 12, p. 107 above, pp. 248-9. For the treatment of Texan ships in the United States, see Moore, *Digest*, vol. I, pp. 176-7. For the view that the admission of insurgent ships does not constitute recognition, see Lauterpacht, p. 181.

<sup>11</sup> E.g., the visit and reception of the insurgent leaders, as in the case of the reception of Garibaldi by British officials (Smith, vol. I, p. 300).

<sup>12</sup> Hall, p. 43; G. F. de Martens, *Précis de Droit des Gens*, vol. II, p. 207, n.d.

<sup>13</sup> Rougier, *op. cit.*, pp. 202-10.

<sup>14</sup> Article 4 (2), Resolutions of 1900 (Scott, *op. cit.*, n. 9, p. 335 above, p. 158).

<sup>15</sup> Wheaton to Secretary Upshur, August 23, 1843 (Moore, *Digest*, vol. I, p. 168).

<sup>16</sup> (1887) 120 U.S. 227, 233.

The above analysis seems to show that, apart from express declarations, all other modes of recognition contain some elements of uncertainty. Acts which have often been considered by a State as amounting to acts of recognition, have at other times not been so considered by the same State. Or different States and different writers may find themselves holding diametrically opposing views concerning the same act. Is there any objective standard by which acts may be tested for their significance with respect to the question of recognition? It has been suggested that, to constitute recognition, the intention of the recognising State should be taken as the determinant.<sup>17</sup> But unless recognition is confined to express declarations, the question still remains: what acts are sufficiently indicative of such intention?

A test for the recognition by the established government is suggested by Hall as follows: ‘. . . the performance of acts of such kind as those the expectation of which justifies recognition by a foreign State, should alone be held to imply recognition by the parent State.’<sup>18</sup> But what is the act of the established government which justifies recognition by foreign States? This is to beg the question. For the act of the established government which justifies recognition by foreign States must necessarily be itself an act of recognition. It is not the single act of the State which is important; rather, all material elements must be taken into consideration. If there is in reality a war, any act which corroborates this fact can be entered as evidence. A *dictum* of Fuller C.J. in *Underhill v. Hernandez* (1897) is in point:

‘And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof.’<sup>19</sup>

### § 3. WHICH ORGAN OF THE STATE IS COMPETENT TO ACCORD RECOGNITION?

In order to determine whether an act is an act of recognition, it may be necessary to subject it to a procedural test. In con-

<sup>17</sup> See Hall, p. 42; Article 4 (1) of the Resolution of the Institute of International Law, 1900 (Scott, *op. cit.*, p. 158); Padelford, *loc. cit.*, n. 82, p. 348 above, p. 236.

<sup>18</sup> Hall, p. 43.

<sup>19</sup> (1897) 168 U.S. 250, 253.

sequence of the belief that an act of recognition entitles the State to certain rights and imposes certain duties, it is necessary that such an act emanate from the organs which are in a position to bind the State.

This question has been considered in connexion with the recognition of States and governments<sup>20</sup> and the arguments and conclusions there maintained are generally applicable here. However, there is one point which has special reference to the recognition of belligerency and may be brought up in this connexion.

Although recognition in general is concerned with foreign relations, the recognition of belligerency in the State's own territory may be a question not entirely within the province of foreign relations. In *The Prize Cases* (1862),<sup>21</sup> in which the issue was whether the executive or the legislature should have the power to recognise the belligerency of the Confederacy, neither side advanced the argument that it was a matter of foreign relations. The point of disagreement was whether, under the Constitution, the President in his capacity as the Commander-in-Chief of the Army and Navy had power by a war measure to transform a portion of the citizens into a public enemy.

The dissenting opinion of Nelson J. maintains that the power to make war, whether foreign or internal, resides with Congress.<sup>22</sup> The majority opinion, however, held that, although the Congress alone has power to declare war, the President has power to make war. A civil war can exist without a declaration by Congress. It is within the power of the President as the Commander-in-Chief to accord to the rebels the character of belligerency and the court is bound by his decision.<sup>23</sup>

<sup>20</sup> Above, Part Four, Chapter 15.

<sup>21</sup> 2 Black 635.

<sup>22</sup> At p. 690.

<sup>23</sup> At p. 670. See also *Williams v. Bruffy* (1877), 96 U.S. 176, 189.

## CHAPTER 25

### TERMINATION OF BELLIGERENCY

THE termination of war alone terminates the condition of belligerency. Once a situation ceases to be a war there is no longer any ground for any party to insist upon continuing the relations incident, and incident only, to a state of war. Upon the surrender of the Confederate generals in April, 1865, the British Government was urged by the Law Officers to put an end to the war-time relations.

‘The true rule of conduct,’ they said, ‘appears to us to be, that the Neutral State should acknowledge as promptly and as completely as the obligations of good faith towards the defeated belligerent will permit, the fact, with all its consequences, that the war is at an end, and that the victorious belligerent now represents the only power within the limits of the Union, which Her Majesty can any longer treat as entitled to international recognition, either for the purposes of war, or otherwise. . . .’<sup>1</sup>

On the 2nd June Great Britain acknowledged the termination of the war. On the 23rd June the blockade was raised by a proclamation of the President, and in October the normal relations of peace were fully restored.<sup>2</sup>

This is a simple case where fact and law coincide. The situation presents a greater difficulty when the question is whether recognition can be revoked by the recognising State before the war has in fact come to an end. If recognition is a ‘concession of pure grace’ and an act of unfettered discretion, it would logically follow that revocation is permissible. This is the view of the Institute of International Law.<sup>3</sup>

Both a theoretical and a practical objection may be raised to such a theory.

In theory, it is doubtful whether it is in the nature of the act

<sup>1</sup> Opinion of May 20, 1865 (Smith, vol. I, p. 324).

<sup>2</sup> *Ibid.*, pp. 324-5; Moore, *Digest*, vol. I, pp. 187-8. The Spanish neutrality decree was similarly annulled (Moore, *ibid.*, p. 188).

<sup>3</sup> Article 9, Resolution of 1900 (Scott, *op. cit.*, n. 9, p. 335 above, p. 159).

of recognition itself to be capable of revocation. If recognition is regarded as a mere declaration of fact, the impossibility of revocation is plain.<sup>4</sup> But even assuming recognition as an act of investiture, is it possible to divest the insurgents of the status of belligerency once they have been so invested? Assuming, for the sake of argument, that recognition creates rights at all, it creates rights *in rem*, and after setting up a permanent state of things, it passes away into a historical fact. A revocation of recognition does not obliterate *ipso facto* all the consequences of recognition. 'If a treaty stipulates for the cession of territory or the recognition of a new State', writes Hall, 'the act of cession or of recognition is no doubt complete in itself. . . .'<sup>5</sup>

The second objection to the revocation theory is that it is impracticable. If the revoking State is the established government, such a revocation merely means that it gives up at its own convenience the rights of war, while it cannot compel neutrals to deny those also to the insurgents. If revocation is by a foreign State, it would mean either that it would resist impartially the exercise of belligerent rights by both belligerents or that it would take the side of one party. In the former case, it never ceases to be neutral: it merely makes neutrality more burdensome than following the well-regulated path of ordinary neutrality.

Hall, although in principle in agreement with the theory of the irrevocability of recognition, however, expresses his views in such a way that they are not entirely free from objection. Thus he writes:

'Recognition of belligerency, when once it has been accorded, is irrevocable,<sup>6</sup> except by agreement, so long as the circumstances exist under which it was granted; for although as between the grantor and the grantee it is a concession of pure grace, and therefore revocable, as between the grantor and third parties new legal relations have been set up by it, which being dependent on the existence of a state of war, cannot be determined at will so long as the state of war continues in fact.'<sup>7</sup>

To this view two criticisms may be offered. First, it is doubtful how revocation can be effected by agreement. Agreement

<sup>4</sup> See above, p. 259.

<sup>5</sup> Hall, p. 404.

<sup>6</sup> This part of the sentence is quoted with approval by Westlake (*op. cit.*, n. 15, p. 15 above, vol. I, p. 57).

<sup>7</sup> Hall, p. 42. Also Rougier, *op. cit.*, n. 2, p. 97 above, pp. 216, 396-7.

with the insurgents would be out of the question. An agreement between the established government and a third State to deprive the insurgents of their belligerent rights would *ipso facto* be a participation of the third State on the side of the government. Secondly, Hall seems to regard the effect on the interests of the third parties, other than the insurgent body, as the sole obstacle to an unilateral revocation. He seems to treat recognition as a bargain between the grantor and those third parties, a bargain which had to be stuck to, even if it turned out to be unfavourable. This theory is based solely upon the assumption that the application of the laws of war is exclusively for the benefit of the grantor, and ignores the larger setting which makes the application of such laws a necessity. The reasons which impel a recognition of belligerency are the same as those which necessitate the continuation of legal relations thus established. The international law of war is observed because it regulates most equitably the relations of all parties concerned, and not for the special advantage of any particular party. As long as war exists, this law would continue to provide the basis for legal relations between the parties. It would not be justifiable for any party to terminate such relations while the conditions of fact remain unchanged.



## CHAPTER 26

### RECOGNITION OF INSURGENCY

THE term 'insurgency' is used in the technical sense to denote the condition of political revolt in a country in which the rebellious party has not attained the character of a belligerent community. It is an intermediate stage between a state of tranquillity and a state of civil war.<sup>1</sup> The existence of armed contention is the same as in a civil war, but, for the lack of one or more of other essential qualities, insurgency is a condition which is in fact, and therefore in law, falling short of a state of civil war.<sup>2</sup>

It has been held by some writers that the difference between insurgency and belligerency lies purely in the question of recognition. To them, belligerency is recognised insurgency. It is thought that without recognition insurgency is a 'war in the material sense' in contrast to a 'war in the legal sense' in the case of belligerency. Thus, Wilson maintains that 'war in the full sense, according to international law, can exist only by declaration or recognition of belligerency by a State', although, failing such a declaration, 'an armed contest may, nevertheless, exist and of this fact others must often take notice'.<sup>3</sup> Likewise, Hyde argues that, while the recognition of belligerency serves to clothe each of the parties with rights of war, the recognition of insurgency 'does not strengthen the legal position already attained

<sup>1</sup> Moore, *Digest*, vol. I, p. 242. Distinctions have been made between various degrees of civil disturbance. See Articles 149-51 of the *Instructions for the Government of Armies of the United States in the Field*, General Orders, April 24, 1863 (Moore, *Digest*, vol. II, p. 159); Woolsey, *op. cit.*, n. 2, p. 105 above, p. 240; Hyde, vol. II, p. 1692; Jessup, *loc. cit.*, n. 1, p. 307 above, p. 270. But except for the distinction between belligerency and insurgency, the distinctions between other grades of violence are not entirely clear. See the *Pinson Case* (1928), decided by the French-Mexican Mixed Claims Commission, in which the distinctions were completely disregarded (39 R.G.D.I.P., 1932, p. 230; Green, *op. cit.*, n. 7, p. 141 above, No. 183).

<sup>2</sup> Thus, the Cuban rebellion of 1868 and the Brazilian Naval Revolt of 1893 did not advance beyond the stage of insurgency, because of the lack of a regular political organisation. See Moore, *Digest*, vol. I, p. 194, vol. II, p. 1115. The Brazilian insurgents also lacked land forces (Lauterpacht, p. 176, n. 2).

<sup>3</sup> Wilson, *loc. cit.*, n. 1, p. 370 above, p. 46.

by the insurgents; . . . it does not impose upon the outside State the technical burdens of a neutral'.<sup>4</sup> The same idea occurs to Beale who says that a situation of insurgency may exist where 'belligerency may in fact exist; but a State may not wish or need to recognise it'. It may, however, be necessary to recognise the existence of hostilities. 'Such a recognition is of insurgency, not of belligerency.'<sup>5</sup>

Although in these quotations the importance of the formula of 'recognition' is unduly exaggerated, it is nevertheless true that there may exist a stage of civil conflict in which the international law of war does not fully apply. We have maintained previously<sup>6</sup> that the status of belligerency is the outcome of the existence of civil war, and not of recognition. The difference between belligerency and insurgency is one of fact. If the fact is one of civil war, the lack of recognition alone does not justify the denial of belligerent rights to the parties. There is no such magic power in the word 'recognition'. For this reason, 'recognition' of insurgency does not create any special status for the parties concerned.<sup>7</sup> To speak of the 'recognition' of insurgency is to use the word in its plain meaning, that of acknowledging the fact of insurrection. The question arises only as to the most appropriate way of dealing with such a situation of fact.

When a situation of insurgency exists it may be necessary for a foreign State to take measures of precaution, so as to be insured against blame. It may be necessary to enforce certain domestic laws to prevent its territory from being used as a base of hostilities against the established government and to prevent its nationals from taking part in them; it may have to relax its rights against the rebels and their ships and treat them with some

<sup>4</sup> Hyde, vol. I, p. 203.

<sup>5</sup> Beale, *loc. cit.*, n. 2, p. 364 above, p. 406, n. 1.

<sup>6</sup> Above, p. 350.

<sup>7</sup> The view has been held by some writers that the 'recognition of insurgency' is an intermediate grade of 'recognition', which creates international status. Thus, see Oppenheim, vol. I, p. 135; Fauchille, *op. cit.*, n. 24, p. 15 above, vol I, Pt. I, s. 199 (2); Wehberg, *loc. cit.*, n. 15, p. 356 above, pp. 101-2. The contrary view is held by Lauterpacht, who observes: 'It is therefore only by way of description and not of inexhaustive definition of a status that writers speak of recognition of insurgency' (p. 276, n. 4). Similarly, Wilson, *loc. cit.*, pp. 59-60. As there is no clear line of demarcation between the condition of 'insurgency' and other less serious situations of civil strife, it is obviously impossible to attach the former with any definite legal consequences. Wilson suggests that the term 'admission of insurgency' should be used instead of 'recognition of insurgency' (U.S. Naval War College, *International Law Situations*, 1912, p. 19).

measure of leniency. As these are not strict duties of international law,<sup>8</sup> they vary in measure and extent, although the practice of States has to some extent crystallised as regards certain of these matters.<sup>9</sup>

'Recognition' of insurgency is therefore in essence a domestic proclamation, drawing the attention of the public to a state of fact in a foreign State which calls for special caution.<sup>10</sup> The United States furnishes the greatest number of examples of such recognition. During the First Cuban Rebellion President Grant repeatedly declared the existence of hostilities, although they did not amount to a state of civil war.<sup>11</sup> The insurgency of the Colombian revolt of 1885<sup>12</sup> and the Haitian insurrection of 1888<sup>13</sup> were also recognised by the United States.

The recognition of the Cuban insurrection of 1895-1898 by the United States was considered by Moore to be 'the clearest recognition of the state of insurgency or revolt as a distinctive condition'.<sup>14</sup> On June 12, 1895, the President of the United States declared that Cuba was 'the seat of civil disturbances, accompanied by armed resistance to the authority of the established government of Spain', and reminded American citizens of the provisions of the neutrality laws.<sup>15</sup> This fact was mentioned again in his Annual Message of December 2, 1895,<sup>16</sup> the Proclamation of July 27, 1896, and his Annual Message of December 7, 1896.<sup>17</sup> Upon the basis of these proclamations, the United States Supreme Court held that Section 5283 of the Revised Statute should apply. For the first time, the Court made the distinction between the 'recognition of the existence of war in the material sense and of war in a legal sense'.<sup>18</sup>

<sup>8</sup> Lauterpacht, p. 276. There seems to be one consequence of the fact of insurgency of which international law takes cognizance, namely, that the occupation of a port by insurgents prevents the established government from proclaiming a closure of that port. See Oppenheim, vol. I, p. 136; also above, pp. 385-6. [See also discussion on case of *Oriental Navigation Co.* (1928), in Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 367-9.]

<sup>9</sup> See below, p. 401.

<sup>10</sup> Wilson, *loc. cit.*, pp. 59-60.

<sup>11</sup> Messages of December 6, 1869 (Moore, *Digest*, vol. I, p. 194) and December 7, 1875 (*ibid.*, p. 196).

<sup>12</sup> See Wharton, *loc. cit.*, n. 7, p. 335 above, p. 125 (Moore, *Digest*, vol. II, p. 1100).

<sup>13</sup> President Cleveland, Message of December 3, 1888 (*ibid.*, vol. VII, p. 1080).

<sup>14</sup> *Ibid.*, vol. I, p. 242.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 198.

<sup>17</sup> *Ibid.*

<sup>18</sup> *The Three Friends* (1877), 166 U.S. 1, 63-6.

When the condition of insurgency is acknowledged, a foreign State generally takes certain measures or assumes a certain attitude regarding the following matters:

*Precautionary measures to prevent its territory from being used as a base for hostile activities against the established government.* No doubt, the duty to respect the territorial sovereignty of a friendly State is a duty which exists in time of tranquillity as well as in time of civil strife.<sup>19</sup> Neither the fact of the insurrection nor the admission of it enlarges the international obligations of foreign States.<sup>20</sup> Yet it is also true that the existence of a condition of civil strife makes the performance of that duty more burdensome. In some countries, it is necessary to invoke the aid of municipal legislation designed for that purpose. With the exception of the Act of 1794 of the United States, the so-called 'neutrality legislation' of Great Britain and the United States is applicable to a case of insurgency. At least, when applied to a case in which the offence is rendering service to the insurgents it is not necessary that their belligerent status be presupposed. This is particularly true with regard to Section 5283 of the United States Revised Statute. In *United States v. Trumbull* (1891),<sup>21</sup> concerning the application of that law to a vessel fitted out in the service of the unrecognised Congressionist insurgents in Chile, it was held that the law required impartial treatment to both sides, because the section was found in the Chapter entitled 'Neutrality'. This view has been opposed by most authorities.<sup>22</sup> It was definitely rejected in *The Three Friends* (1897), in which it was held:

'... the maintenance unbroken of peaceful relations between

<sup>19</sup> Although the Institute of International Law especially provides for this duty (Article 2 (3), Resolution of 1900, Scott, *op. cit.*, n. 9, p. 335 above, p. 157) with regard to a situation of civil strife, it does not necessarily mean that the duty does not exist in peacetime. [It should not be forgotten that Members of the United Nations have undertaken to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State' (Charter Article 2 (4)). Article 4 of the Draft Declaration of the Rights and Duties of States adopted by the International Law Commission declares that 'every State has the duty . . . to prevent the organisation within its territory of activities calculated to foment civil strife' in another's territory (7 *United Nations Bulletin*, 1949, p. 15).]

<sup>20</sup> Wilson, *loc. cit.*, pp. 59-60; Hyde, vol. II, p. 2333.

<sup>21</sup> 48 Fed. Rep. 99 (Moore, *Digest*, vol. VII, pp. 1080-1).

<sup>22</sup> See above, p. 387. See also Opinions of Attorneys-General Hoar (Moore, *Digest*, vol. VII, p. 1079) and Harmon (*ibid.*, p. 1081) and the observation by Moore (*ibid.*, pp. 1080-1).

two powers when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorised acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.’<sup>23</sup>

The action of the United States has been consistently guided by this principle. The prohibition has been enforced only against aid to insurgents. Thus it was decided that ships of the Haitian Government, then fighting against insurrection, might be refitted in the United States, and that their supplies and ammunition ought not to be interfered with,<sup>24</sup> and that contracts with the Colombian Government in time of civil strife constituted no contravention of the neutrality statute.<sup>25</sup> But the furnishing of arms to Indians in insurrection against Mexico was considered a violation of that statute.<sup>26</sup> In cases, however, where there are more than two factions in a civil strife, and none of them is the established government, it is believed that the ‘neutrality laws’, if applicable, should operate equally on all parties.<sup>27</sup>

*Presumption of non-piratical character of insurgent vessels.* Since an insurgent body is not a subject of international law its ships cannot acquire the status of regularly commissioned vessels recognisable by foreign States. Strictly speaking, therefore, they can claim no protection under international law from being treated as pirates by foreign States. It is probably on this strictly legal ground that Secretary Fish of the United States wrote, with reference to the Haitian insurgent ships, that ‘We may, or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense’.<sup>28</sup> Under normal circumstances, if insurgent ships commit no depredation against

<sup>23</sup> 166 U.S. 1, 52.

<sup>24</sup> Seward to Wheelwright, September 15, 1868 (Moore, *Digest*, vol. VII, pp. 1076-7).

<sup>25</sup> Bayard to Gibbons, July 3, 1885 (*ibid.*, p. 1079).

<sup>26</sup> *Gandara v. U.S.* (1929), 33 F. (2d) 394, Circuit Court of Appeals (9th Circuit). Also *Wiborg v. U.S.* (1896) 163, U.S. 632, 647; (1897) *The Three Friends*, 166, U.S. 1.

<sup>27</sup> President Cleveland, Message of December 3, 1888 (Moore, *Digest*, vol. VII, p. 1080).

<sup>28</sup> Fish to Bassett, September 14, 1869, with reference to the revolt in Haiti (*ibid.*, vol. II, pp. 1085-6).

foreign ships, neither justice nor policy would require this unmitigated assertion of right. The case of *United States v. Smith* (1820)<sup>29</sup> is cited by Westlake as an example of the existence of such a right. But the facts of this case do not bear this out. Although the prisoner was a member of the crew of a vessel commissioned by the insurgent government of Buenos Aires, he had mutinied and was not in fact acting on behalf of the insurgent body. The court rightly treated the case as one of common robbery and did not make any ruling as regards the status of insurgent ships as such.

The case of *The Ambrose Light* (1885)<sup>30</sup> is a more precise example. The judgment was, however, subjected to such devastating criticisms<sup>31</sup> that it does not seem to have been followed in later decisions.<sup>32</sup> As a matter of fact, at the time of the trial Secretary of State Bayard was strongly against the capture. He declared that 'no prize court of the United States could legitimatise the taking of one of the so-called piratical insurgent vessels of Colombia' and that the American Commander taking the ship would be 'directly intervening in the domestic strife in Colombia, which would be unauthorised'. He cited the case of *The Friederich-Karl* in which a similar act by a German cruiser was disavowed by the German Government.<sup>33</sup> On a subsequent occasion he pointed out that the capture was contrary to the opinion of Nelson J. in *United States v. Baker* (1861),<sup>34</sup> in which it was held that depredation upon one nation exclusively does not constitute piracy.<sup>35</sup> In his Annual Message of December 8, 1885, President Cleveland emphatically declared that insurgent vessels could not be deemed '*hostes humani generis* within the precepts of international law'.<sup>36</sup>

<sup>29</sup> 5 Wheat. 153.

<sup>30</sup> 25 F. 408, Hudson, p. 187; above, p. 334.

<sup>31</sup> See the criticism of Wharton, that foreign States ought not to interfere to suppress rebellion in another State (*loc. cit.*, p. 125, Moore, *Digest*, vol. II, pp. 1104-5).

<sup>32</sup> See the opinion of the Solicitor for the State Department, 1929 (Hackworth, vol. II, pp. 696-9).

<sup>33</sup> Bayard to Whitney, April 15, 1885 (Moore, *Digest*, vol. II, p. 1097).

<sup>34</sup> 5 Blatch. 6, 12 (*ibid.*, p. 1079).

<sup>35</sup> Bayard to Whitney, July 14, 1885 (*ibid.*, p. 1097).

<sup>36</sup> Wharton, vol. III, p. 467. See also Bayard to Becerra, Colombian Minister, April 24, 1885 (Moore, *Digest*, vol. II, p. 1090). This view was restated in a note to Colombia in 1900 (*ibid.*).

This policy of presuming the non-piratical character of insurgent ships has also been adopted by other Powers.<sup>37</sup> A narrower interpretation of this rule was, however, applied by Dr. Lushington in *The Magellan Pirates* (1853). It was held that the presumption of non-piratical character must be negated as regards acts of insurgent ships which are unconnected with the rebellion.<sup>38</sup> It is also thought by some writers that operations by insurgent ships after the termination of the insurrection would be deemed piratical.<sup>39</sup>

Since the basis for the presumption of the non-piratical character of insurgent ships is the principle of non-interference in the domestic affairs of other States, that principle cannot be maintained unless foreign States are free to disregard the decrees of the established government declaring insurgent vessels as pirates. This position has always been taken by foreign States<sup>40</sup> and is upheld by the majority of writers.<sup>41</sup>

The case is different where the insurgent ships commit depredations upon ships or property of foreign States. British and

<sup>37</sup> See the policy of the British, French and German Governments towards Spanish insurgents in 1873 (Calvo, *op. cit.*, n. 19, p. 337 above, vol. I, ss. 497-501); the policy of the Brazilian Government in the cases of *The Porteña*, 1873 (*ibid.*, s. 502) and *The Montezuma*, 1877 (*ibid.*, s. 503); the action of the Roumanian Government in the case of *The Kniaz Potemkin*, 1905 (Cobbett, vol. I, p. 321). In the case of *The Montezuma*, however, the British Government took a contrary view (Lauterpacht, p. 312).

<sup>38</sup> 1 Spinks E. and A. 81, 86.

<sup>39</sup> See comments on *The Shenandoah* incident (1865), in Westlake, *op. cit.*, vol. I, p. 186; Oppenheim, vol. I, p. 561.

<sup>40</sup> See the following cases of the refusal of foreign States to enforce the piracy decrees of the established governments: the British, French and German Governments during the Spanish Civil War, 1873 (Hall, p. 318; Calvo, *op. cit.*, vol. I, ss. 497-9, vol. III, ss. 1146-8, Lauterpacht, pp. 327-8); the Brazilian Government in the cases of *The Porteña*, 1873 (Calvo, *op. cit.*, vol. I, s. 502) and *The Montezuma*, 1877 (*ibid.*, s. 503); the United States Government during the Venezuelan revolt in 1885 (Moore, *Digest*, vol. II, pp. 1105-6), during the Colombian revolt in the same year (*ibid.*, p. 1055; Wharton, vol. III, p. 467), during the Nicaraguan revolt in 1899 (Moore, *Digest*, vol. II, 1121). See also Secretary Frelinghuysen to Langston, December 15, 1883 (*ibid.*, p. 1087). During the Spanish Civil War, 1936-39, the Spanish request to treat insurgent ships as pirates was merely acknowledged by the United States (Hackworth, vol. II, p. 696). See also Article II of the Havana Convention, 1928 (*ibid.*, p. 695).

<sup>41</sup> Wharton, quoted in Moore, *Digest*, vol. II, pp. 1104-5; Calvo, quoted *ibid.*, p. 1101; Wilson, U.S. Naval War College, *International Law Situations*, 1904, p. 35 *et seq.*; Lauterpacht, p. 296. The same view is expressed by the Subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law (Hackworth, vol. II, p. 695). The following writers are of the view that insurgents, so long as they confine their activities to violence against their enemy, cannot be regarded as pirates: Hall, pp. 312-3, 318; Hyde, vol. I, p. 773; Cobbett, vol. I, p. 321; Westlake, *op. cit.*, vol. I, p. 185.

American practice has been to regard such acts as piratical.<sup>42</sup> Even so, the treatment meted out to the insurgents is usually less drastic than would have been the case with real pirates.<sup>43</sup> The claims of States to resist and suppress acts of violence against their ships are often not limited to those committed by unrecognised insurgents.<sup>44</sup> This being the case, the fact that insurgent ships committing depredations upon foreign ships are resisted and punished does not necessarily mean that the stigma of piracy is attached for the sole reason of their insurgency. It is therefore generally correct to say that foreign States usually take notice of the fact of insurgency in order to discriminate insurgent ships from ordinary pirates.

*Concession of a limited right of war.* Whether a foreign State may concede to an insurgent body the exercise of certain belligerent rights against itself is a question which cannot be answered in unqualified terms. There is one opinion which regards the exercise of war rights by the insurgents within the territorial limits of their own country as an unquestionable right. Thus, in 1858, Attorney-General Black of the United States declared that 'there is no authority for a doubt that the parties to a civil war have the right to conduct it with all the incidents of lawful war within the territory to which they both belong'.<sup>45</sup> Sir Arnold McNair suggests that the insurgents should have a right of 'quasi-blockade' within territorial waters.<sup>46</sup> Professor Hyde holds a more restrictive view. He denies the right of insurgents to establish a blockade, although he agrees that under certain conditions they might enjoy rights within territorial waters, and thinks that

<sup>42</sup> See *The Magellan Pirates* (n. 38 above) and the numerous cases mentioned in Lauterpacht, pp. 298-303.

<sup>43</sup> *Ibid.*, pp. 304-5. [In *The Magellan Pirates* the captured insurgents had been handed over to the legitimate government; the action being for bounty for the capture of pirates.] See also Article II, Havana Convention of 1928 Hackworth, vol. II, pp. 695-6).

<sup>44</sup> Thus, the United States denounced the activities of Spanish privateers as piratical (Secretary Adams to Nelson, April 28, 1823, Manning, *Diplomatic Correspondence of the United States Concerning the Independence of the Latin-American Nations*, 1925, vol. I (Pt. I-II), p. 167). The same charge was preferred against Argentinian authorities in 1832 (Secretary Livingston to Baylies, April 13, 1832, Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs*, 1932, vol. I, p. 14). See also *The Magellan Pirates* (1853), 1 Spinks E. & A. 81, 83. The Nyon Agreements of 1937 (31 A.J.I.L., 1937, Supplement, p. 179) may perhaps be regarded as belonging to this category, as they treated as piratical ships which might have belonged to the Republican Government of Spain.

<sup>45</sup> Moore, *Digest*, vol. II, p. 1078.

<sup>46</sup> McNair, *loc. cit.*, p. 488.



a 'reasonable effort by the insurgents within the territorial waters appurtenant to an area under their control to prevent military aid from reaching their foes would probably be respected'.<sup>47</sup> During the Brazilian revolution of 1893-1894, the United States Navy took steps to oppose the activities of the insurgents within the territorial waters.<sup>48</sup> This is criticised by Moore, who says: 'The existence of domestic hostilities does not in itself confer upon foreign powers any legal authority within the jurisdiction of the nation, within which the insurrection prevails'.<sup>49</sup>

It is believed that the principle of territorial sovereignty is a paramount principle of international law, which may be disregarded only under conditions of absolute necessity.<sup>49a</sup> The fact that foreign States may not interfere with the operation of hostilities within the territorial limits of the troubled State must be explained by the existence of this paramount principle, and not by the fact that the recognition of insurgency has made the exercise of belligerent rights permissible. The existence of civil strife is merely a fact which justifies the plea of non-responsibility of the established government, provided it has exercised due diligence in the suppression of the insurrection.<sup>50</sup> A foreign State, which cannot hold the established government responsible for acts of insurgents, and is not entitled to take direct action within the territorial limits of the troubled State, must either avoid entering into that State or submit to interference by the contesting parties. Such a situation would, in appearance, seem to be a partial concession of belligerent rights. In reality, it is only the application of the principle of territorial sovereignty, and the admission of the right of revolution.

*Maintenance of intercourse with insurgents.* So long as the insurgents hold some sections of the territory and population under their power, intercourse with them would be inevitable. During the Chilean revolution of 1891 the diplomatic corps avoided direct intercourse with the insurgents, and its protests were sent through the consular corps at the ports. There were,

<sup>47</sup> Hyde, vol. II, p. 2186; also Moore, U.S. Naval War College, *International Law Situations*, 1901, p. 137; Wilson, *ibid.*, 1912, pp. 32-3.

<sup>48</sup> Moore, *Digest*, vol. III, pp. 1115, 1117-8.

<sup>49</sup> *Ibid.*, p. 1120.

<sup>49a</sup> [See, for example, comments of International Court of Justice, *Corfu Channel Case* (Merits), (1949) *I.C.J. Reports* 1949, p. 4, at pp. 34-35.]

<sup>50</sup> See above, pp. 328, 373-4.

however, constant contacts between the British and insurgent naval officers, and gun salutes were exchanged.<sup>51</sup> During the Brazilian revolution of 1893-1894 foreign naval officers were also constantly in touch with the insurgents.<sup>52</sup> Oppenheim seems to consider it proper for foreign States not having recognised the belligerency of the insurgents to maintain with them certain relations necessary for the protection of their nationals, for securing commercial intercourse, and for other purposes connected with the hostilities.<sup>53</sup> Needless to say, such intercourse cannot but be informal, temporary and matter-of-fact.

In conclusion, it may be said that the recognition of insurgency, like the recognition of belligerency, is the acknowledgment of a certain state of facts. But in the case of insurgency the situation of fact falls short of a civil war and does not constitute a distinct status for the insurgents giving rise to special rights and duties prescribed by international law. The fact of insurgency is nevertheless different from a normal condition of peace. Foreign States are obliged to take notice of this disturbed condition and to adjust themselves to it. On the one hand, they would have to concede the plea of irresponsibility of the established government; on the other hand, they would have to exert themselves against attempts to use their territories as bases of hostilities against the established government. They would generally regard with leniency the activities of the insurgents, even if their own interests were interfered with. The foreign States in assuming such an attitude would no doubt be imposing extra burdens upon themselves, but such burdens would seem to be inevitable, if the foreign States are prepared to observe scrupulously the supreme principles of the independence and the territorial sovereignty of the troubled State.

<sup>51</sup> Moore, *Digest*, vol. II, p. 1109.

<sup>52</sup> *Ibid.*, pp. 1114-6.

<sup>53</sup> Oppenheim, vol. I, p. 135. Also Lauterpacht, p. 270.



## PART SEVEN

### *THE DOCTRINE OF NON-RECOGNITION*



## CHAPTER 27

### THE MEANING OF THE DOCTRINE

AS has been shown, since the establishment of a new State or government or the outbreak of a civil war is itself not illegal in international law, recognition by foreign States is not a pronouncement on the legal right to rule or the right to attain power, but is at most an expression of a political attitude and evidence of the official knowledge of the facts having taken place. [In such instances, an act of recognition 'can be adduced against (the recognising State) by other subjects of international law as evidence of acquiescence. . . . Short of a customary rule of international customary or treaty law, a new state of affairs is not *opposable* to a State which has not recognised it, and, if it has done so, only within the limits of such recognition'.]<sup>1</sup> The rôle of recognition is different, however, in cases where the act or situation in question is internationally illegal or of questionable legality. In such a case, recognition assumes the character of a waiver of a claim, in so far as it concerns the recognising State, and an act of quasi-legislation, as regards the whole community, if participated in by a sufficient number of States.<sup>2</sup> Non-recognition is said to 'bar the legality' of the act or situation in question,<sup>3</sup> unless otherwise legalised. Examples of this type of non-recognition are numerous. Thus, in 1890, France refused to recognise the British protectorate over Zanzibar.<sup>4</sup> In 1908 Great Britain refused to recognise the annexation of the Congo by Belgium,<sup>5</sup> and of Bosnia and Herzegovina by Austria-Hungary.<sup>6</sup> The Russian denunciation of the

<sup>1</sup> [Schwarzenberger, *op. cit.*, n. 55, p. 22 above, p. 62.]

<sup>2</sup> Lauterpacht, p. 412.

<sup>3</sup> See letter from Secretary Stimson to Senator Borah, February 24, 1933, quoted in Wright, *The Stimson Note of January 7, 1932*, 26 A.J.I.L., 1932, 342, at p. 343.

<sup>4</sup> See Williams, *loc. cit.*, n. 35, p. 123 above, p. 276.

<sup>5</sup> Cmd. 6606, 1913, p. 22. Recognition was also refused by the United States (Hackworth, vol. IV, p. 684).

<sup>6</sup> Gooch and Temperley, *British Documents on the Origin of the War, 1898-1914*, vol. V, p. 390.

régime of the Black Sea in 1870 was refused recognition by the Powers, signatories to the Declaration of Paris, 1856.<sup>7</sup> The United States refused to recognise the Sino-Japanese Treaty of 1915.<sup>8</sup> In 1917 China also declared its non-recognition of the Lansing-Ishii Agreement between the United States and Japan.<sup>9</sup> A policy of non-recognition was declared by the United States in the famous Stimson Note of January 7, 1932, which was followed by similar pronouncements by various organs of the League of Nations and its members.<sup>10</sup> This doctrine of non-recognition was applied by nineteen American States in August, 1932, to the Chaco dispute between Bolivia and Paraguay,<sup>11</sup> by the United States, France and the Soviet Union to the German annexation of Czechoslovakia in 1939,<sup>12</sup> and by the United States to the Soviet annexation of the Baltic Republics in 1940.<sup>13</sup>

That the two classes of non-recognition are of distinctly different nature may be easily seen. An internal revolutionary change, although it violates municipal law, does not violate international law, and its lawfulness is therefore not subject to scrutiny by foreign States. On the other hand, in

<sup>7</sup> McNair, *Law of Treaties*, 1938, pp. 351-4.

<sup>8</sup> MacMurray, *Treaties and Agreements with and Concerning China, 1894-1919*, vol. II, p. 1236.

<sup>9</sup> U.S. For. Rel., 1917, p. 270.

<sup>10</sup> See Hill, *Recent Policies of Non-Recognition*, 1933, pp. 361-8; Willoughby, *Sino-Japanese Controversy and the League of Nations*, 1935, p. 206 *et seq.*; Langer, *Seizure of Territory*, 1947, chapter 10. The relevant passage of the Stimson Note reads: 'In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it cannot admit the legality of any situation *de facto* nor does it intend to recognise any treaty or agreement entered into between these Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the open-door policy; and that it does not intend to recognise any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well as the United States, are parties' (*Documents on International Affairs*, 1932, p. 262; Langer, *op. cit.*, p. 58).

<sup>11</sup> *Survey of International Affairs*, 1933, pp. 407-8; Langer, *op. cit.*, p. 68.

<sup>12</sup> Langer, *op. cit.*, pp. 221-2, 231. But no parallel step was taken by Britain (Parl. Deb., H.C., 5th ser., vol. 348, col. 1786; vol. 347, cols. 961, 962; Langer, *op. cit.*, pp. 223-30).

<sup>13</sup> See Briggs, *Non-Recognition in the Courts: The Ships of the Baltic Republics*, 38 A.J.I.L., 1944, p. 585; Langer, *op. cit.*, p. 263. The doctrine was, however, not formally invoked in the cases of the Italian annexation of Abyssinia in 1936 (*ibid.*, Ch. 21; Spenser, *The Italo-Ethiopian Dispute and the League of Nations*, 31 A.J.I.L., 1937, p. 614; L.o.N. Off. J. Special Supplement, No. 151, p. 60) and the German annexation of Austria in 1938 (p. 67 above).

the case of an alleged violation of international law, foreign States, being themselves interested parties, would necessarily claim the right to satisfy themselves of the legality of the act or situation in question before treating it as valid. Here, recognition is not a mere confirmation of facts, but may have the effect of creating or conferring, at least so far as the recognising State is concerned, rights previously non-existent.

It may be objected that such a distinction does not justify the application of different principles in the two cases. As recognition is accorded to new States and governments for the reason of their actual existence accompanied by a reasonable assurance of permanence, so also, it is argued, an act or situation in violation of international law should be regarded as legal once evidence of permanence can be adduced, because it may be presumed from such permanence that the law has been modified in view of the changed facts. This argument is basically true, but only to the extent of saying that the principle *ex factis jus oritur*<sup>14</sup> is applicable to both situations. Within the limits of this general principle, there may still be room for the two cases to be treated differently. In the first place, in the case of new States or governments, the principle operates as the sole criterion of legality: legal quality should not be denied to the actual possessor, as soon as his possession is secured, *but no sooner*. In the case of illegal acts or situations, the principle only sets a lower limit, leaving the injured State discretion to accord recognition, *even when the possession of the wrongdoer may still be precarious*. The waiver of a right or the changing of law through quasi-legislation is a free act. When done prior to the legalisation through other means, such as prescription, it confers rights on the wrongdoer, and is therefore constitutive in effect.<sup>15</sup> Secondly, the principle that permanence of possession eventually creates legal rights, though applicable to tangible matters, such as the occupation of territory, does not apply in the same way as regards intangible matters. Supposing States A and B enter into a treaty to divide up a portion of the open sea, and A subsequently renounces it on the ground of illegality, it is not supposed that the treaty can be legalised by the fact that B has had prolonged 'possession'

<sup>14</sup> Below, p. 420 *et seq.*

<sup>15</sup> In the recognition of States and governments, the rights are acquired through the operation of the law, and the recognition is therefore declaratory.



of the right. Thirdly, the test of 'permanence' in the case of illegal acts is not physical possession alone. It rather lies in the conviction of the bulk of States that the fact as it exists must be accepted as inevitable. In the absence of such a conviction, the physical possession may still be insecure. But if such a conviction does exist, the very manifestation of it would constitute recognition. To argue that, when a situation passes the test of permanence, recognition can be dispensed with, is therefore to argue in a circle. These considerations lead inevitably to the conclusion that, subject to the fundamental principle of *ex factis jus oritur*, the recognition of illegal acts or situations should be treated differently from the recognition of States and governments.

In view of this difference, it would seem unjust to accuse Mr. Stimson of inconsistency for maintaining the doctrine of non-recognition of international illegality after having declared himself against the Wilsonian doctrine of constitutionalism in the recognition of revolutionary governments.<sup>16</sup> Nor can the criticism be made against the American Institute of International Law or the States represented at the Seventh International Conference of American States, who declared that non-recognition should be applied to illegal acquisitions of territory, but not to revolutionary governments.<sup>17</sup> The distinction has been emphatically pointed out by Professors Lauterpacht<sup>18</sup> and Wright,<sup>19</sup> and, less emphatically, by Sir Arnold McNair,<sup>20</sup> though the idea has powerful dissentients.<sup>21</sup>

The fact that, in the actual course of events, elements of both types of recognition often enter into a single situation may have added confusion to the issue. For instance, a new State may be set up in the territory of an existing State through the intervention of a foreign State. However, if, once set on its feet, the new State is in fact able to lead an independent national life, the

<sup>16</sup> Lippmann and Scroggs, *op. cit.*, n. 41, p. 112 above, p. 334.

<sup>17</sup> Project VI, Article 5, and Project XXX of the American Institute of International Law, 30 A.J.I.L., 1936, Special Supplement, p. 310; Articles 3 and 11 of the Montevideo Convention, 1933, 28 A.J.I.L., 1934, Supplement, pp. 76, 77.

<sup>18</sup> Lauterpacht, pp. 410, 412, 419-20.

<sup>19</sup> Wright (ed.), *Legal Problems in the Far Eastern Conflict*, 1941, p. 118.

<sup>20</sup> McNair, *The Stimson Doctrine of Non-Recognition*, 14 B.Y.I.L., 1933, p. 65, at pp. 66-7.

<sup>21</sup> E.g., Moore, *An Appeal to Reason*, 11 *Foreign Affairs*, 1933, p. 547, at p. 578; Middlebush, *Non-Recognition as a Sanction of International Law*, 27 *Proceedings*, 1933, p. 40, at p. 44; Cavaré, *loc. cit.*, n. 34, p. 17 above, p. 1; Borchard, in Wright, *op. cit.*, p. 157.

mere fact that the intervening State had committed a breach of international law by the intervention does not necessarily invalidate the legal existence of the new State. Its recognition should be determined according to the usual principle of *de factoism*. On the other hand, if the intervention has not been discontinued, the situation is one of invasion under the guise of a separatist movement. The 'State' cannot be recognised, for want of the necessary requisites of statehood. The question would be one of recognition of conquest, and not of recognition of a State.<sup>22</sup>

In view of the differing character of the two types of case, it may be said that the doctrine of non-recognition of illegal acts or situations is not in any way a contradiction to the declaratory theory of recognition, as applied to new States or governments. In every legal community, the law, however weak, does not succumb to violations without resistance, and the doctrine of non-recognition serves the purpose of preserving the legal *status quo ante* before the submission of law to the dictates of circumstances. One can reject the doctrine only if the non-recognition is unduly prolonged and eventually unsuccessful. It will be of great service, if, in any particular case, law should triumph over the law-breaker, a situation which may not be entirely excluded from possibility.

<sup>22</sup> Cf. above, pp. 58, 299.

## CHAPTER 28

### THE OBLIGATION OF NON-RECOGNITION

APART from the general international law prohibition against premature recognition, recognition of both types is discretionary, unless regulated by treaty. Mention has already been made of treaties or engagements limiting the right to recognise States and governments.<sup>1</sup> Although internal revolutionary changes are independent of recognition by foreign States, non-recognition may nevertheless bring political and economic pressure to bear upon the unrecognised régime. A treaty of non-recognition would be a reinforcement of the effectiveness of such political and economic pressure.

The practice of States to bind themselves by means of international conventions not to recognise acts or situations in breach of international law is a more recent development. In the past, the purpose of international law has been limited to the protection of the subjective rights of its subjects, as distinguished from the objective rights of the society. An act in violation of a subjective right is illegal, but the illegality does not concern third parties and can be healed by the recognition by the injured party. This is unlike municipal systems of law, under which certain rules are obligatory and their observance is regarded as the common concern of the whole society. The acceptance of the duty of non-recognition in international law is to surrender the private right of legalisation and to introduce into the international system the obligatory character of the law. In this sense, the development may be considered a novelty.<sup>2</sup>

The contribution of the American States in this field is most

<sup>1</sup> Above, pp. 105, 108.

<sup>2</sup> [It is for this reason that Professor Jessup bases his concept of *A Modern Law of Nations*, 1948, upon the principle 'that there must be basic recognition of the interest which the whole international society has in the observance of its law. Breaches of the law must no longer be considered the concern of only the State directly and primarily affected. There must be something equivalent to the national conception of criminal law, in which the community as such brings its combined power to bear upon the violator of those parts of the law which are necessary to the preservation of the public peace' (p. 2).]

noteworthy. They have entered into numerous multipartite agreements and made collective declarations affirming their determination not to recognise territorial changes effected through non-pacific means.<sup>3</sup> Outside of the American Continents comparable arrangements are of less frequent occurrence. A rare example may be found in the Treaty of 1921 between the Soviet Union and Turkey.<sup>4</sup>

The Covenant of the League of Nations does not itself contain an express provision on the duty of non-recognition,<sup>5</sup> nor does the Pact of Paris of 1928. Stimson, in his note of January 7, 1932, did not assume a general duty of non-recognition under the Pact. But any impairment of the treaty rights of the United States could not, he declared, be recognised in view of 'its own rights and obligations therein'.<sup>6</sup> Professor Quincy Wright is of the opinion that the duty of non-recognition flows from the obligation of the parties to the Pact 'to condemn resort to war for the solution of international controversies'. This obligation, he believes, is incompatible with the approval of the results of war involved in an act of recognition.<sup>7</sup> This view is consistent with the Budapest Articles of Interpretation, 1934, of the International Law Association.<sup>8</sup>

It is generally believed that the duty of non-recognition is implied in the Covenant of the League, Article 10 of which reads: 'The Members of the League undertake to respect and preserve

<sup>3</sup> E.g., the plan of the International American Conference of 1890 (Moore, *Digest*, vol. 1, pp. 292-3); the declaration by Nineteen American States, August 6, 1932, regarding the Chaco dispute between Paraguay and Colombia (*Survey of International Affairs* (1933), p. 408); Article 2 of the Anti-War Treaty of Non-Aggression and Conciliation of October 10, 1933, signed at Rio de Janeiro (28 A.J.I.L., 1934, Supplement, p. 79); Article 11 of the Convention on Rights and Duties of States of December 26, 1933, signed at Montevideo (*ibid.*, p. 77); Article 1 of the Convention to Co-ordinate, Extend and Assure the Fulfilment of the Existing Treaties Between American States, signed at Buenos Aires, December 23, 1936 (31 *ibid.*, 1937, Supplement, pp. 59-60); the Havana Declaration No. XV, July, 1940, and the Act of Chapultepec, March 6, 1945 (Langer, *op. cit.*, n. 10, p. 412 above, pp. 82-3).

<sup>4</sup> See Article 1 of the Treaty (118 B.F.S.P., 1923, pp. 990-991).

<sup>5</sup> Unsuccessful attempts were made to incorporate the principle into the Covenant by Brazil in 1921 (L.o.N. Records the 2nd Assembly, Meetings of Committees, pp. 400-1), by Finland in 1928 (L.o.N. Records of the 9th Ordinary Session of the Assembly, Special Supplement No. 64, p. 75) and by Peru in 1929 (L.o.N. Records of the 10th Ordinary Session of the Assembly, Special Supplement No. 75, p. 168).

<sup>6</sup> Above, p. 412, n. 10 (italics added).

<sup>7</sup> Wright, *op. cit.*, n. 19, p. 414 above, p. 117, n. 10. *Contra*, Langer (*op. cit.*, p. 49), who thinks that there is no such obligation.

<sup>8</sup> Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 *Grotius Transactions*, 1934, p. 178. Text printed *ibid.*, p. 205.

as against external aggression the territorial integrity and existing political independence of all Members of the League' (italics added). The refusal to treat a violation as legal seems to be the minimum exertion that ought to be required from other members consistent with their obligations under the Article.<sup>9</sup> This seems to be the interpretation adopted by members of the Council (except China and Japan) in an appeal to Japan on February 16, 1932,<sup>10</sup> and in the Council Resolution of March 8, 1933, regarding the dispute between Peru and Colombia,<sup>11</sup> and also by the League Assembly in the Resolution of March 11, 1932,<sup>12</sup> and in the Assembly Report of February 24, 1933.<sup>13</sup>

The Charter of the United Nations does not contain a 'guarantee clause' similar to Article 10 of the Covenant, yet the members of the United Nations have pledged themselves to suppress acts of aggression or other breaches of the peace (Article I (1)), to settle their disputes by peaceful means (Article 2 (3)), to refrain from the threat or use of force against the territorial integrity or political independence of any State (Article 2 (4)), and to refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action (Article 2 (5)).<sup>14</sup>

<sup>9</sup> McNair, n. 20, p. 414 above, pp. 73-4; Lauterpacht, p. 417; Erich, *loc. cit.*, n. 21, p. 15 above, p. 456; Fauchille, *op. cit.*, n. 24, p. 15 above, vol. I, Pt. II, s. 482; Langer, *op. cit.*, p. 41; Schwarzenberger, *A Manual of International Law*, 1950, pp. 30-31. This is also the general opinion expressed at the Round Table Conference of the Institute of Pacific Relations at Virginia Beach, November-December, 1939 (Wright, *op. cit.*, p. 181).

<sup>10</sup> L.o.N. Off. J., March, 1932 (Part I), p. 384.

<sup>11</sup> L.o.N. Off. J., April, 1933 (Part I), p. 609.

<sup>12</sup> L.o.N. Off. J., 1932, Sp. Suppl. No. 100, p. 8.

<sup>13</sup> 27 A.J.I.L., 1933, Supplement, p. 151.

It has been a matter of some dispute whether the obligation of non-recognition flows directly from the Covenant, and, if not, how far the Assembly Resolution of March 11, 1932, is binding upon the members. See the doubt expressed by Williams (*loc. cit.*, n. 90, p. 52 above, p. 778). Some writers think that the resolution is an interpretation and application of the Covenant (Sharp, *Non-Recognition as a Legal Obligation, 1775-1934*, 1934, p. 191; Langer, *op. cit.*, p. 96; also speech of Mr. Noel-Baker in the Commons, Parl. Deb., H.C., 5th Ser., vol. 336, col. 785). The Assembly Report of February 24, 1933, seems also to regard non-recognition as an existing international obligation, rather than a new one created by the Resolution (27 A.J.I.L., 1933, Supplement, p. 151). In any case, so far as those members of the League who have voted for the Resolution of March 11, 1932, are concerned, the obligation is indisputable (Lauterpacht, p. 417, n. 4). But see the summing up of the President of the Council, Mr. Munters, May 12, 1938, that the members of the League were free to determine the matter 'in the light of their own situation and their own obligations' (L.o.N. Off. J., 1938, p. 346).

<sup>14</sup> [Goodrich and Hambro (*op. cit.*, n. 98, p. 210 above), however, find it possible to discuss all these paragraphs without mentioning non-recognition (pp. 93, 101-8).]

It is hardly possible that recognition of illegal acquisitions could be compatible with these obligations. It is believed by some writers that the duty of non-recognition is also implied in the Nine-Power Treaty, 1922, and the Locarno Treaties of 1925.<sup>15</sup>

<sup>15</sup> Sharp, *op. cit.*, pp. 122, 124.

## CHAPTER 29

### THE DOCTRINE OF NON-RECOGNITION AND THE MAXIM *EX FACTIS JUS ORITUR*

THE doctrine of non-recognition signifies the advocacy of the principle that an act or situation should be regarded as illegal, if, in the contemplation of the non-recognising State, it is a violation of international law. This doctrine must be based upon the assumption of the existence of law and the possibility of distinguishing between what is lawful and what is unlawful. This distinction, while it presents no difficulty in municipal systems, does not, in view of the special character of international society, seem to be self-evident. In international society, the State assumes the position of both a subject as well as a legislator. An act in derogation of an existing rule of law may be an illegal violation of law, or, in certain circumstances, may develop into a new rule of law. This brings into special prominence the rôle in international law of the maxim *ex factis jus oritur*.

Like all systems of law, international law is based upon social reality. On the one hand, the validity of law, like the validity of grammar, is not dependent upon actual observance in any particular case; on the other hand, continuous breach of the law with impunity may eventually undermine its validity. Continuous toleration of breaches of law by society is an indication that the law no longer corresponds with social facts and that a new law which sanctions the rights originating in illegality is in the making. This does not mean, however, that every successful breach of law can immediately assume the dignity of a new legal order.<sup>1</sup> The problem of jurisprudence is precisely to find the point at which a rule of law ceases to represent the social reality and ought to give place to a new rule.<sup>2</sup>

After every important international upheaval there occurs a

<sup>1</sup> For example, it has been pointed out that the invasion of Germany did not extinguish the neutralisation of Belgium, which was expressly reaffirmed in the treaty of May 22, 1926 (McNair, *loc. cit.*, n. 87, p. 207 above, p. 114).

<sup>2</sup> Lauterpacht, pp. 426-7; Goebel, *op. cit.*, n. 21, p. 15 above, pp. 47-8.

shift of political, economic and social balance, with the result that new legal principles have to be evolved and new legal orders have to be introduced to suit the new social reality. An example of international quasi-legislation<sup>3</sup> may be said to have taken place, in so far as it purports to readjust the legal relations between members of the international society.<sup>4</sup> The readjusted legal relations would then receive the protection of the society, despite the fact that the new situation may have resulted from a derogation of rights protected by the pre-existing legal order.<sup>5</sup> Less apparent may be the 'legislative' activities of individual States. Yet, unless the existing legal order is supported by an overwhelming physical force, there is the possibility that an illegal fact, if sustained and promising permanence, may, although created by a single state, have to be tolerated and form a part of the new legal order.

The precariousness of the superiority of the power of the international society over disruptive forces has made it possible for individual States to take, not only law, but also legislation, into their own hands. Here, the maxim *ex factis jus oritur* may be said to have its widest scope of operation. The authority of law is reduced almost to a figure of speech. The fundamental remedy lies in raising the margin of superiority of the social force over the disruptive forces. This task has been assigned to such peace instruments as the Covenant of the League of Nations, the Pact of Paris, and the Charter of the United Nations. The purpose of these instruments is to build up the organised force of the international society, and at the same time forbid the private use of force by its individual members. But the curtailment of the maxim *ex factis jus oritur* will not be effective unless the principle is recognised that the amendment of the law through its violation by individual States is invalid. Conversely, the doctrine of non-recognition can have no meaning if every act of violence automatically becomes law through its own force.

<sup>3</sup> The term 'legislation' may, in strictness, mean only changes in legal rules. Here it is used to include alterations in the legal situation under such rules. Cf. Gihl, *International Legislation*, 1937, p. 79.

<sup>4</sup> If the readjustment is embodied in treaties, such treaties may be regarded as law-making. See *Keith's Wheaton*, vol. I, pp. 520-1; McNair, *loc. cit.*, pp. 112-5; Wright, *Conflict between International Law and Treaties*, 11 A.J.I.L., 1917, pp. 566, 572 *et seq.*

<sup>5</sup> Law represents the will of the dominant part of the community for the time being and is enforceable only with the support of that dominant part. See Roxburgh, *The Sanction of International Law*, 14 A.J.I.L., 1920, p. 26.



It is indeed true that war performs an important function in international society, and, like revolution within a State, it is a means of rectifying the discrepancy between law and fact, between the force of stability and the force of change.<sup>6</sup> It is not suggested that war, any more than revolution, can be abolished by law. War is extra-legal, is beyond the law. If the basis of the legal order is fundamentally altered by war and revolution, the law must be changed accordingly. *Ex factis jus oritur*. But the law cannot contemplate the use of force in its own violation as an everyday instrument for the changing of rights. This is the point at which the maxim should cease to operate and the doctrine of non-recognition should apply. The doctrine of non-recognition, together with the principles of the Covenant, the Pact, and the Charter, does not deny the inevitability of war, revolution and the maxim *ex factis jus oritur*. It merely attempts to bring the situation into closer resemblance to municipal laws, by removing the initiative for international law-making and law-changing from the hands of single defiant States to those of the society, without dismissing, however, the possibility of violent changes through general revolutionary wars, in which case, theoretically, it may still be considered as a change by the force of the society, and not of an individual.

<sup>6</sup> Brierly, *International Law and Resort to Armed Force*, 4 *Cambridge Law Journal*, 1932, p. 308, at p. 318; Williams, *The New Doctrine of Recognition*, 18 *Grotius Transactions*, 1932, p. 109, at p. 110.

## CHAPTER 30

### THE DOCTRINE OF NON-RECOGNITION AND THE EXISTENCE OF OBJECTIVE LAW

THE doctrine of non-recognition as contained in Stimson's Note of January 7, 1932, specifies two kinds of legal relationship to which the doctrine is to apply: an agreement which may impair the Treaty rights of the United States, and one 'which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928'.<sup>1</sup> The first involves a violation of substantive rights. The application of the doctrine of non-recognition to this case cannot give rise to legal objections, as it has always been the practice of States to deny the validity of acts in violation of their rights. It is the second situation to which objections have been directed. Thus Sir John Fischer Williams has argued that there is no such thing as objective illegality,<sup>2</sup> and that an act can be illegal only when the right of a subject of the law is violated. What is illegal to A may not be illegal to B. Consequently an act is not invalid *inter partes* merely because a third party questions its legality.<sup>3</sup> An act done by illegal methods may give rise to claims, but the *result* of the act need not be illegal.<sup>4</sup> As an illustration, he cites the case of the Anglo-German Treaty of 1890. Although that treaty may have been an infringement of French rights under the Anglo-French Treaty of 1862 regarding the status of Zanzibar, the cession of Heligoland by Britain to Germany provided in the 'illegal' treaty of 1890 need not be illegal.<sup>5</sup> Similarly, if a State violates a treaty not to maintain an army, it does not entitle other States to treat that army as bandits.<sup>6</sup> Or an analogy from private law, if A builds a house and materials for it are carried through B's land; the trespass is

<sup>1</sup> Above, p. 412, n. 10.

<sup>2</sup> Williams, *loc. cit.*, n. 90, p. 52 above, p. 789.

<sup>3</sup> *Ibid.*, p. 790.

<sup>4</sup> Williams, *loc. cit.*, n. 35, p. 123 above, pp. 270-1.

<sup>5</sup> *Ibid.*, p. 276.

<sup>6</sup> *Ibid.*, p. 278.

illegal, but the title to the house (the 'result' of the trespass) is not affected.<sup>7</sup>

Williams' argument is that a third State whose right is not directly injured has no right to question the legality of an act; and that, even if not recognised by third States, the act will still be binding *inter partes*. Both of these propositions are open to challenge.

The first proposition is to deny the existence of objective law. It is true that, in international law as it is to-day, public protection of rights falls far short of adequacy. But the public right of members of the international society to have the law observed cannot be said to be absent.<sup>8</sup> It is not altogether new for nations to claim the right to regard as illegal a situation in which no subjective right of their own is involved.<sup>9</sup> Often the question of the legality of acts of other States is thrust upon them, and a pronouncement on their lawfulness is unavoidable. Thus a State may have to decide upon the legality of the conferment of title by a foreign State to property found within occupied territory.<sup>10</sup> The view that there is objective law in the international society is fully borne out by the International Commission of Jurists dealing with the Åland Island dispute between Sweden and Finland. It was held by that Commission that the Declaration of Paris, 1856, constituted a 'true objective law'. States, though having no subjective rights under it, may acquire rights 'by reason of the objective nature of the settlement'.<sup>11</sup> To say that an act is objectively illegal does not mean that it can be illegal without any right being injured. It means only that the right injured is the public right of a member of the society to have the law maintained. Williams, in denying the notion of 'objective illegality,' said: 'An objective illegality, that is, illegality apart from the violation of either a private or a *public right*, is something unknown, so I believe, to legal science.'<sup>12</sup> It seems that

<sup>7</sup> Williams, *loc. cit.*, n. 4 above, p. 277.

<sup>8</sup> See Root, *The Outlook for International Law*, 9 *Proceedings*, 1915, 2; Wright, *op. cit.*, n. 19, p. 414 above, p. 83; Peaslee, *The Sanction of International Law*, 10 *A.J.I.L.*, 1916, p. 328, at p. 331 *et seq.*

<sup>9</sup> See examples, Wright, *op. cit.*, p. 84, n. 2.

<sup>10</sup> See various possibilities considered in Lauterpacht, p. 424.

<sup>11</sup> L.O.N. Off. J., No. 3, Special Supplement, 1920; *Survey of International Affairs*, 1920-1923, pp. 234-8; McNair, *So-called State Servitudes*, 6 *B.Y.I.L.*, 1925, p. 111, at p. 114.

<sup>12</sup> Williams, *loc. cit.*, n. 2, above, p. 789.

his objection to the notion of 'objective illegality' is only a matter of definition and not of principle.

If an act violating an objective rule of law is considered illegal and without effect by every member of the international society, the law-breaking State can derive little comfort from the thought that it is not void *inter partes*. The essence of the legal validity of an act consists in the assurance of support from the society. The lack of this support may perhaps be ignored, only if the parties concerned are willing voluntarily to carry out the effect of the act, whether it be legal or illegal, such as the execution of a suicide pact. If, on the other hand, the case is, as it is likely to be, one in which one of the parties has submitted to violence because it has no power to resist, non-recognition by the society would enable the unwilling party to deny the effect of the act without itself committing a breach of law. If the act is one of the transfer of territory, non-recognition may cause substantial difficulties to the effective assertion of sovereignty by the law-breaker. It would seem that non-recognising States would be under no obligation, either under general international law, or under the special guarantees such as provided in Article 10 of the Covenant, to respect the sovereignty of the law-breaking State with regard to the territory in question.<sup>13</sup>

The suggestion that the 'result' of an illegal act may not necessarily be invalid can be supported only upon two conditions. First, the relation between the illegality and the 'result' must not be too immediate. Thus, the examples given by Sir John Fischer Williams regarding the cession of Heligoland and the house-building sustain his argument only because of the remoteness between the illegality and the 'result'. Supposing, instead of Heligoland, Britain ceded to Germany a part of Normandy, or, instead of carrying materials through B's land, A illegally built his house on B's land, the illegality of the 'result' would be manifest.

Secondly, the law violated must not be of a peremptory character. Sir John himself admits that if a treaty violates a general superior rule of international law or morality and is tortious against a third party, such as a treaty to revive the slave trade or to encourage piracy, it would be null and void *ab initio*.<sup>14</sup>

<sup>13</sup> McNair, *loc. cit.*, n. 20, p. 414 above, p. 73.

<sup>14</sup> Williams, *loc. cit.*, n. 4 above, p. 282.

In his example of the treaty prohibiting the maintenance of an army, the question lies in whether the prohibition constitutes a peremptory rule of law or merely a contractual obligation.<sup>15</sup> If the former, the refusal to apply the laws of war to an army thus illegally maintained may not be altogether out of the question. In 1864, and again in 1868, when certain States threatened to revive privateering, the British Law Officers took the view that the belligerent rights of visit and search could be denied to such privateers.<sup>16</sup> On the similar question whether a violator of the Covenant, Pact, or Charter is entitled to the rights of war, there is considerable authority for the view that he ought to be denied such rights.<sup>17</sup>

It is believed that the fundamental principle of general jurisprudence expressed in the maxim *ex injuria jus non oritur*, according to which an illegality cannot be a source of legal right to the wrongdoer, is applicable in international law, subject to the qualification that the exercise of clear legal powers may establish rights, even though those powers are exercised in breach of a legal duty.<sup>18</sup> An act may be illegal because it is a breach of a contractual obligation, or of an obligatory rule of law. A breach of contractual obligations merely entitles the injured party to the annulment of the agreement and to a claim for damages,<sup>19</sup> whereas a breach of an obligatory rule of law would render the act void.<sup>20</sup>

If a treaty forming part of the general international law is

<sup>15</sup> For the distinction, see below, p. 435.

<sup>16</sup> McNair, *Law of Treaties*, 1938, pp. 518, 519-20.

<sup>17</sup> See Lauterpacht, p. 423; Wright, *op. cit.*, p. 95; Anderson, *Harmonising the League Covenant with the Peace Pact*, 27 A.J.I.L., 1933, p. 105 at p. 106; Schwarzenberger, *op. cit.*, n. 5, p. 260 above, pp. 98-9, 108-110, and *loc. cit.*, n. 83, p. 72 above, p. 114; proposed Geneva Protocol of 1924 (L.o.N. Assembly Document C. 582, M. 199, 1924, IX), Article 15, quoted in Wright, *Responsibility for Losses in Shanghai*, 26 A.J.I.L., 1932, p. 586, at p. 587. *Contra*, Woolsey, *Peaceful War in China*, 32 A.J.I.L., 1938, p. 314, at p. 318; Moore, *loc. cit.*, n. 21, p. 414 above, p. 561; Jessup, *The Birth, Death and Reincarnation of Neutrality*, 26 A.J.I.L., 1932, p. 789, at p. 792; [in *A Modern Law of Nations*, Jessup suggests that more stringent rules might be applied against such a law breaker than against those upholding the law on behalf of the international organisation (p. 214).] In the late war there was, however, no attempt to outlaw the Axis forces [although such a policy was advocated by Schwarzenberger, *op. cit.*, n. 5, p. 260 above, Ch. 4].

<sup>18</sup> Wright, *op. cit.*, p. 91; Lauterpacht, pp. 420-4; Sharp, *op. cit.*, n. 13, p. 418 above, pp. 196-205.

<sup>19</sup> Fenwick, *International Law*, 1948, p. 452; Hall, p. 408; *Keith's Wheaton*, vol. I, p. 515; Hackworth, vol. V, pp. 342-3; McNair, *op. cit.*, p. 515; Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 203-4.

<sup>20</sup> See below, p. 435.

violated, it is obvious that the purpose of the law cannot be achieved by its annulment by the injured parties. It would be absurd to vindicate law by a reversion to lawlessness.<sup>21</sup> It is in the nature of such a treaty that, in the event of violation, it is the right and the duty of other parties to insist upon its observance. Such may be said to be the nature of the Declaration of Paris, 1856,<sup>22</sup> the Pact of Paris, 1928,<sup>23</sup> the League Covenant and the Charter of the United Nations.<sup>24</sup> The fact that the Covenant (Article 17) and the Charter of the United Nations (Article 2 (6)) contain stipulations providing for their enforcement upon non-members indicates that these instruments contemplate the establishment of, not merely subjective contractual relations between parties, but a system of objective law in the international community.<sup>25</sup>

The development of such objective obligatory laws points clearly to the creation of an international community in which a breach of law is deemed an offence against the entire community and each of its members.<sup>26</sup> It matters little who is materially injured by the breach: every member of the community is entitled to claim the vindication of law as a matter of his own legal right.<sup>27</sup> In such a community, an objective standard binding upon all

<sup>21</sup> Scelle, *op. cit.*, n. 20, p. 15 above, vol. II, p. 338.

<sup>22</sup> See the view of the British Law Officers that, in the event of the violation of the Declaration by other countries, it would be open to England to proceed 'at once and irrespective of English interests' to enforce compliance with the Declaration (McNair, *op. cit.*, pp. 519-20).

<sup>23</sup> See Wright, *The Meaning of the Pact of Paris*, 27 A.J.I.L., 1933, p. 39; Garner, *Non-Recognition of Illegal Territorial Annexation and Claims of Sovereignty*, 30 *ibid.*, 1936, p. 679, at p. 684.

<sup>24</sup> Article 16 of the Covenant is precisely designed to become operative only in case of a violation; Article 6 of the Charter provides for the expulsion of a consistent violator.

<sup>25</sup> See the contrary view that Article 17 of the Covenant binds only members of the League (Anzilotti, *op. cit.*, n. 7, p. 14 above, vol. I, pp. 415-6). [As regards the Charter, Goodrich and Hambro state that 'it is doubtful whether an international instrument like the Charter can impose legal obligations on States which are not parties to it. The traditional theory . . . is that treaties cannot obligate third parties. If this theory is accepted the authority of the United Nations under this paragraph is based exclusively upon the will and power of the contracting parties' (*op. cit.*, n. 98, p. 210 above, pp. 108-9). See also Kelsen, *op. cit.*, n. 11, p. 213 above, who says, 'If the Charter attaches a sanction to a certain behaviour of non-Members, it establishes a true obligation of non-Members to observe the contrary behaviour,' p. 107. *Cx.*, however, opinion of International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations* (1949, I.C.J. Reports, 1949, p. 174, at p. 185).]

<sup>26</sup> Cf. Jessup, *op. cit.*, p. 2, see above, p. 416, n. 2.

<sup>27</sup> The United States regarded the maintenance of the sovereignty of China as a treaty right of the United States. (Stimson Note, p. 412 above, n. 10.)

would exist for testing the legal validity of the acts of its members. Non-recognition would be the natural attitude of the law-abiding members towards illegal acts. Probably the main difference between international and intra-national society lies, not in the lack of objective law for testing the validity of acts, but in the lack of a central authority to administer the test, and the lack of effective means to rectify the illegality.<sup>28</sup>

<sup>28</sup> For discussions on the lack of central authority and the inadequacy of sanctions, see below, pp. 439-40.

## CHAPTER 31

### THE APPLICATION OF THE DOCTRINE

#### § 1. NEW STATES, NEW GOVERNMENTS AND BELLIGERENCY

ALTHOUGH non-recognition is often spoken of in connexion with new States, new governments and belligerency, it is a question of a different nature from that which is under discussion, as those situations are, in general, in no way violations of international law. The element of illegality only enters when the establishment of a State or government<sup>1</sup> is brought about by the acts of foreign States. Should a State or government thus established as the result of the intervention be refused recognition? Sir John Fischer Williams is undoubtedly right in arguing that the new State, being non-existent at the time of the act of violation, ought not to be penalised for an act for which it cannot be responsible.<sup>2</sup> The real violator is the intervening foreign State. However, if the 'State'—or 'government'—does not in fact exist, except as an instrument of the foreign State, recognition cannot be accorded, not because of the illegality of origin, but because the 'fact' of existence is farcical. The question is rather one of recognition of conquest to which the doctrine of non-recognition should apply.<sup>3</sup>

<sup>1</sup> The contingency of civil war is not considered in this connexion. It is not conceivable that a foreign State can bring about a civil war, for its intervention in a civil war automatically transforms the struggle into an international war. Hill, however, thinks that belligerency brought about by means contrary to the Pact of Paris may be 'non-recognised' (*op. cit.*, n. 10, p. 412 above, p. 395).

<sup>2</sup> Williams, *loc. cit.*, n. 35, p. 123 above, pp. 292-4. This was probably the case when Great Britain protested against the proclamation of independence by Bulgaria in 1908 as a violation of the Treaty of Berlin (Gooch and Temperley, *op. cit.*, n. 6, p. 411 above, vol. V, pp. 398-9). Bulgaria was not a party to the Treaty. (69 B.F.S.P., 1877-1878, p. 749.)

<sup>3</sup> This is probably an answer to Cavaré's plea for the recognition of 'Manchukuo' on the ground that it 'existed' (*op. cit.*, n. 34, p. 17 above, p. 31 *et seq.*). [Although there was much criticism by foreign States that the Communist *coup* in Czechoslovakia in 1948 had been made possible by Soviet intervention, the new Government was not refused recognition; an attempt was, however, made by Chile to have the situation investigated by the Security Council of the United Nations, but this was prevented by the exercise of the Soviet veto (U.N. Docs. S/PV 268, 272, 273, 276, S.C. Official Records, 3rd Year, Nos. 53, 56, 63, 71, 73, 74).]



## § 2. ACQUISITION OF TERRITORY

Title by conquest is the necessary result of the admissibility of war as an instrument for the modification of existing rights.<sup>4</sup> The validity of the title thus acquired is not affected by the fact that rights of third States may be injured in consequence of the non-execution of their treaties with the former sovereign of the absorbed territory.<sup>5</sup> Those rights of third States are to be determined by the principles of State succession, which regulate the extent to which treaty obligations are to be passed on to a succeeding sovereign.<sup>6</sup>

Since the advent of the Covenant of the League of Nations, the Pact of Paris and the Charter of the United Nations, treaty-making under duress has been rendered illegal' [—although duress against the person of the negotiator was regarded as rendering a treaty voidable<sup>7</sup>—] and other States signatories to those documents are under the obligation of non-recognition.<sup>8</sup> Consequently, the only means open to the conqueror to make good his title is through the process of prescription, [unless *debellatio* has taken place and been followed by annexation or the creation of a new subject of international law].<sup>10</sup> Critics of the doctrine of non-recognition have often invoked the principle of prescription to show that *de facto* situations ought eventually to be

<sup>4</sup> Oppenheim, vol. I, pp. 524-5; Hill, *op. cit.*, n. 10, p. 412 above, p. 397. Some writers, such as Bonfils, Fiore and Despagnet, however, refuse to recognise subjugation at all as a mode of acquiring territory (Oppenheim, vol. I (6th ed.), p. 521). [In the *Ottoman Debt Arbitration* (1925) Professor Borel, sole arbitrator, said: 'Whatever may be the effects of occupation of a territory before the re-establishment of peace, it is certain that this occupation alone cannot create the transfer of sovereignty. . . . The transfer of sovereignty can only be considered as taking effect by the entry into force of the treaty which provides for it and with effect from the date stipulated therein' (1 *Reports of International Arbitral Awards*, p. 529, at p. 555). Cf., also, Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 141-3.]

<sup>5</sup> See the opinion of the Virginia Beach Round Table, in Wright, *op. cit.*, n. 19, p. 414 above, p. 182. For British practice, see McNair, *op. cit.*, n. 16, p. 426 above, p. 390 *et seq.* For the case of the Japanese annexation of Korea, see Perrinjaquet, *Corée et Japon*, 17 R.G.D.I.P., 1910, p. 532, at p. 545 *et seq.* However, in the case of the *Anschluss* between Germany and Austria, there is considerable opinion holding the union to be void on the ground of its contravention of treaty obligations (above, p. 67).

<sup>6</sup> See Jones, *State Succession in the Matter of Treaties*, 24 B.Y.I.L., 1947, p. 360; Schwarzenberger, *op. cit.*, p. 87.

<sup>7</sup> See below, pp. 437-8.

<sup>8</sup> [Jones, *Full Powers and Ratification*, 1946, p. 72, n. 5; Schwarzenberger, *op. cit.*, n. 79, p. 418 above, p. 62; Oppenheim, vol. I, p. 802.]

<sup>9</sup> See above, pp. 417-9.

<sup>10</sup> See discussion on Germany, p. 70 *et seq.* above.

legalised.<sup>11</sup> But it must be remembered that, assuming that prescription is an accepted principle of international law, the process would require undisturbed possession for a considerable length of time.<sup>12</sup> Until such conditions have been met, no valid title can be acquired by the conqueror. It is doubtful<sup>13</sup> whether these conditions will ever be fulfilled if protests and claims are being kept up by the conquered State (if it still exists) and other States. However this may be, it may be said that the doctrine of non-recognition as applied to acquisition of territory does not of itself invalidate a title otherwise valid, but merely deprives the conqueror of the more convenient modes of consolidating his title, which does not become valid until legalised.<sup>14</sup>

By making territorial changes more difficult, the doctrine of non-recognition does not necessarily result in the fossilisation of the territorial *status quo*.<sup>15</sup> It only insists that peaceful means, and not force, should be employed for the modification of existing rights. When a *de facto* situation arises making the continued maintenance of the existing legal order absolutely impossible, it would still be open to the society of nations to modify its laws by means of general recognition. The effect of non-recognition is merely to hold as unchanged what is still undetermined, and not a refusal to admit any change which has already become definitive.

The non-recognition of a territorial acquisition would entail the following legal consequences: the non-execution with respect to the territory in question of treaties between the non-recognising State and the former sovereign; impediments to the diplomatic protection of nationals of the non-recognising State in that territory; and the non-application of guarantees such as Article 10 of the Covenant and the Pact of Paris, with respect to that territory. It has been pointed out by Sir Arnold McNair in regard to the first point, that the non-recognising State may have as much to lose as the annexing State, and that the non-execution of extradition treaties will benefit nobody but the alleged criminals.

<sup>11</sup> Moore, *loc. cit.*, n. 52, p. 114 above, p. 436.

<sup>12</sup> Oppenheim, vol. I, p. 527; Hall, pp. 143-4, 681; Moore, *Digest*, vol. I, pp. 293-7; Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 139-41.

<sup>13</sup> See Lauterpacht, p. 428.

<sup>14</sup> Oppenheim, vol. I, p. 525.

<sup>15</sup> This criticism is raised in Williams, *loc. cit.*, n. 35, p. 123 above, p. 310; same, *loc. cit.*, n. 90, p. 52 above, p. 788.

As regards the second point, it is said that the necessity of negotiating with the local authorities for the protection of nationals may make non-recognition unreal.<sup>16</sup>

It is not denied that a policy of non-recognition may cause inconveniences and material losses to the non-recognising State. These are the price a member of the society must pay for the maintenance of its law.<sup>17</sup> Such inconveniences and losses may occur also in other circumstances, such as the military occupation of the territory of one State by another in time of war. It has not been argued that the law of belligerent occupation should be changed by conferring immediate title on the occupant, in order to spare neutral States the inconveniences and losses they now incur.

In fact, the conquest of a territory which is unconfirmed is precisely equivalent to a case of belligerent occupation extended into the time of peace.<sup>18</sup> The occupant does not acquire the title, not because the control is not effective, but because the ultimate decision has not been reached.<sup>19</sup> For this reason, third States are bound to regard as unchanged the legal title of the ousted sovereign. They may probably insist upon the application of former treaties and laws, in so far as the occupant is not entitled to change them according to the laws of belligerent occupation. On the other hand, the occupant is entrusted with extensive powers and charged with extensive responsibilities with regard to the occupied territory. The legal situation is generally defined by the laws of belligerent occupation.<sup>20</sup> Consular protection of nationals is still possible, subject to the handicaps incident to all military

<sup>16</sup> McNair, *loc. cit.*, n. 20, p. 414 above, pp. 72-3. [See Langer (*op. cit.*, n. 28, p. 60 above) for difficulties concerning 'Manchukuo' in this connexion (pp. 70-2).]

<sup>17</sup> See Garner, *loc. cit.*, n. 23, p. 427 above, p. 686.

<sup>18</sup> Woolsey, *loc. cit.*, n. 17, p. 426 above, pp. 318-9. This is the view of the United States. See instructions of State Department with regard to the French occupation of the Ruhr, in which is outlined the rights and duties of foreign occupants in time of peace (Hackworth, vol. I, pp. 146-8). See instances of pacific occupation, above, p. 291, n. 13.

<sup>19</sup> In the case of belligerent occupation, this critical point is reached when the war comes to an end. In the case of illegal acquisition of territory, the period of illegality will continue until the occupant has so consolidated his gains that the prospect of dislodging him by the force of the society appears remote, in which case a modification of the legal order would be called for.

<sup>20</sup> See Hall, pp. 559-60; *Keith's Wheaton*, vol. II, pp. 791-2; Schwarzenberger, *op. cit.*, n. 55, p. 22 above, ch. 30. More extensive powers are conceded to pacific occupants by Cavaré (*Quelques Notions Générales sur l'Occupation Pacifique*, 31 R.G.D.I.P., 1924, p. 339, at pp. 346-51).

occupations.<sup>21</sup> These factors show that non-recognition does not create a legal no-man's-land in the occupied territory. The fact that certain *de facto* relations were being carried on with the unrecognised authorities in Manchuria<sup>22</sup> is not an artificiality which makes a mockery of the doctrine of non-recognition,<sup>23</sup> nor is it a *de facto* recognition which is compatible with the duty of non-recognition.<sup>24</sup> It is merely the ordinary maintenance of permissible relations between a military occupant and third States.<sup>25</sup> A study of the law of belligerent occupation clearly shows that there is no absolute incompatibility between the actual loss of control and the retention of legal title. The contrary view would be to regard every occupation as resulting in a transfer of title.

### § 3. TREATIES

If a treaty between two States should be in violation of a legal right of a third State, is that third State entitled to invalidate the treaty by means of non-recognition? Some writers answer this question categorically in the affirmative.<sup>26</sup> A more restrained view is held by some other writers. They maintain that a conflict with an existing right does not *ipso facto* invalidate the treaty, but merely gives priority to the earlier right.<sup>27</sup> The offending treaty will be enforceable if it is not opposed by the injured State.<sup>28</sup> If treaties are mere contracts between States, these views would no doubt be well in accord with the maxim *pacta tertiis nec nocent*

<sup>21</sup> Both the British and Russian authorities have negotiated with the Japanese authorities, in the capacity as military occupants, for the protection of their rights in Manchuria (Parl. Deb., H.C., 5th ser., vol. 280, col. 1064; Cavaré, *loc. cit.*, n. 34, p. 17 above, p. 35).

<sup>22</sup> See the relations recommended by the Advisory Committee of the League, June, 1933 (Hill, *op. cit.*, n. 10, p. 412 above, p. 455).

<sup>23</sup> As suggested by Borchard (Wright, *op. cit.*, n. 19, p. 414 above, p. 175).

<sup>24</sup> As suggested by Lauterpacht (p. 431 *et seq.*).

<sup>25</sup> See Langer, *op. cit.*, pp. 70-2.

<sup>26</sup> See numerous authorities cited in Harvard Research, *Law of Treaties*, 29 A.J.I.L., 1935, Supplement, p. 1025. Also Wright, *loc. cit.*, n. 3, p. 411 above, p. 346; Lauterpacht, p. 426; same, *The Covenant as the Higher Law*, 17 B.Y.I.L., 1936, p. 54, at p. 60. Roxburgh seems to hold a similar view, when he says that the third State whose right is injured has a right of intervention (*International Conventions and Third States*, 1917, s. 24.)

<sup>27</sup> Vattel, *op. cit.*, n. 14, p. 14 above, Bk. II, Ch. XVII, s. 315; Harvard Research, *loc. cit.*, p. 1024. [Cf., also, Judge van Eysinga's separate opinion in the *Oscar Chinn Case*, (1934) Series A/B, No. 63, pp. 133-136.]

<sup>28</sup> Harvard Research, *loc. cit.*, p. 1026.

*nec prosunt*. The difficulty, however, lies in the circumstance that treaties may often be the embodiment of rules of law and modifications of existing rights, as well as constituting juristic acts under the existing law. If we are to hold the view that a treaty inconsistent with existing rights should be void or should give way to those rights, there will be the danger that the road to progressive international legislation by means of treaties, to which many a rule of modern international law owes its origin,<sup>29</sup> will be blocked, and the development of new rules will have to fall back entirely upon the evolution of custom.

A view directly contrary to the above, such as that held by Williams, is that a treaty in violation of a previous treaty does not become void *inter partes*.<sup>30</sup> This seems to be hardly compatible with his other view that an act or treaty in conflict with a fundamental peremptory rule of international law is void *ab initio*,<sup>31</sup> unless we are to exclude the possibility of establishing fundamental peremptory rules of international law by means of treaties.

A third view, advanced by Anzilotti, is that if States A and B are signatories of treaty X, and later A concludes a conflicting treaty Y with C, B may demand annulment of treaty Y, *if C had recognised treaty X*. If C had not so recognised, B or C whose treaty has not been executed can only claim reparation from A. The argument is that, by 'recognising' the treaty X, C undertakes not to do anything incompatible with the existence of the treaty, and, hence, treaty Y must be regarded as a treaty with '*objet illicite*', voidable on demand of B.<sup>32</sup> Following this principle, two States, both parties to a multilateral treaty, cannot lawfully enter into a treaty conflicting with that multilateral treaty.<sup>33</sup> This view seems also to receive the support of Lauterpacht, who adduces authorities in English law in its favour.<sup>34</sup>

It is doubted whether the 'recognition' of the previous treaty merits such emphasis. If knowledge of the conflict is essential

<sup>29</sup> See, for example, Schwarzenberger, *International Law in Early English Practice*, 25 B.Y.I.L., 1948, p. 52 and *op. cit.*, p. 1.

<sup>30</sup> Williams, *loc. cit.*, n. 35, p. 123 above, p. 280.

<sup>31</sup> *Ibid.*, p. 282.

<sup>32</sup> Anzilotti, *op. cit.*, n. 7, p. 14 above, vol. I, pp. 416-9.

<sup>33</sup> Hill, *op. cit.*, n. 10, p. 412 above, pp. 382-3.

<sup>34</sup> Lauterpacht, p. 426; same, *loc. cit.*, n. 26 above, p. 62, n. 1.

to the illegality of the later treaty, why is not A's knowledge of it sufficient to establish the illegality? It is said that the 'recognition' is an undertaking by C to respect treaty X. But the theory leaves wholly unexplained why C should be expected to show more respect for its undertakings than A, who, by signing treaty X, has certainly pledged itself to observe it.

What, then, is the principle for determining the validity of treaties in conflict with existing obligations? The answer is probably to be found in the distinction between two kinds of obligations with which a treaty comes into conflict: simple contractual obligations, and obligations arising from a peremptory rule of law. In general jurisprudence, an act contrary to a peremptory rule of law is null and void, whereas one contrary to a contractual obligation merely gives rise to a claim for damages, and, under certain circumstances, the right to abrogate the contract violated.<sup>35</sup> This principle is believed to be equally applicable in international law. International lawyers tend to favour the contention that an act or treaty in conflict with a fundamental, peremptory rule of international law is void.<sup>36</sup> When an act or treaty conflicts with a previous contractual obligation, the prior obligation takes precedence.<sup>37</sup> Where the performance required by the previous treaty is not carried out, the injured party would be entitled to damages and, probably, the right of abrogation.<sup>38</sup> The subsequent act or treaty does not *ipso facto* become void. This is particularly the case where the subsequent treaty is 'transitory' or 'dispositive', creating a right *in rem*, and the previous treaty creates only a right *in personam*, in which case, while the subsequent treaty is still enforceable in spite of the previous treaty, the previous treaty becomes unenforceable on account of the subsequent treaty. It is therefore thought that an obligation of non-cession of territory does not render invalid a treaty of cession.<sup>39</sup> If both treaties create

<sup>35</sup> Salmond, *op. cit.*, 10th ed., p. 357; Holland, *Elements of Jurisprudence*, 1924, p. 277; Jenks, *Book of English Law*, 1945, pp. 405-6.

<sup>36</sup> Hall, pp. 382-3; Oppenheim, vol. I, p. 808; *Keith's Wheaton*, vol. I, p. 515; Williams, *loc. cit.*, p. 282; Schwarzenberger does not agree that the matter is as unequivocal as this, *op. cit.*, n. 55, p. 22 above, pp. 187-8.

<sup>37</sup> Above, n. 27.

<sup>38</sup> Above, p. 426, n. 19.

<sup>39</sup> Baty, *International Law in South Africa*, 1900, p. 48; Virginia Beach Round Table, in Wright, *op. cit.*, n. 19, p. 414 above, p. 182. However, seven Latin American States pledged themselves by Article 13 of the Continental Treaty,

obligations *in rem*, the general principle of priority of earlier treaties would prevail.<sup>40</sup>

[Although it is generally true to say that a prior contractual obligation takes precedence over a later commitment incompatible with it, this is not always so. By Article 20 of the Covenant of the League of Nations and Article 103 of the Charter of the United Nations the parties to those instruments recognise the superiority of the obligations therein contained over all other obligations.]

While the principle can be thus simply stated, it may not always be easy, in a given case, to say whether a particular act or treaty is in conflict with a contractual obligation or with a peremptory rule of international law, especially where the rule in question is contained in a treaty. From the formal point of view, there is hardly any difference between a treaty which creates subjective relations and one creating a rule of law.<sup>41</sup> Many writers on international law deny the existence of such a distinction.<sup>42</sup> But other writers believe that such a distinction is both possible and necessary.<sup>43</sup> A *traité-loi* is one which provides for abstract, general, objective and normative rules of conduct, in contrast with the concrete, particular and subjective obligations provided in a *traité-contrat*. It possesses the character of a governing principle for future acts, rather than the disposal of a particular

1856, to the non-cession of their territories and the non-recognition of such cessions (Sharp, *op. cit.*, n. 13, p. 418 above, p. 79). By the '21-Demands' of 1915, Japan imposed upon China the promise of non-alienation of certain parts of the latter's territory (Group IV, and Group V, Article 6, MacMurray, *op. cit.*, n. 8, p. 412 above, vol. II, p. 1233), but there was no provision for non-recognition.

<sup>40</sup> See *Costa Rica v. Nicaragua* (1916), decided by the Central American Court of Justice (11 A.J.I.L., 1917, p. 181); [but the Court declined to make any comment upon the validity of the later treaty, because the United States, a party to that treaty, was not a party to the issue before the Court.]

<sup>41</sup> The number of signatories is not a conclusive test (Starke, *Treaties as a 'Source' of International Law*, 23 B.Y.I.L., 1946, p. 341, at pp. 342, 344-5).

<sup>42</sup> Wright thinks that all treaties are equal; all are under customary international law (*loc. cit.*, n. 4, p. 421 above, p. 566. See, however, below, n. 43). See similar view of Roxburgh, *op. cit.*, s. 3; Hall, p. 8; Gihl, *op. cit.*, n. 3, p. 421 above, pp. 47-53. On the other hand, it is argued by some other writers that all treaties are law-making, as far as the parties are concerned (Lauterpacht, *loc. cit.*, n. 1 above, p. 54; Oppenheim, vol. I, p. 26, n. 3, pp. 793-4; Schwarzenberger, *op. cit.*, n. 9, p. 418 above, p. 12). But see Oppenheim, vol. I, p. 26, on the distinction between law-making and other treaties, and *ibid.*, p. 807, where special superiority is conceded to the Charter of the United Nations.

<sup>43</sup> Brierly, *op. cit.*, n. 17, p. 15 above, pp. 58-60; Scelle, *op. cit.*, n. 20, p. 15 above, vol. II, p. 331 *et seq.*; McNair, *loc. cit.*, n. 87, p. 207 above, p. 100; Wright, *The Interpretation of Multilateral Treaties*, 23 A.J.I.L., 1929, p. 94, at p. 99; Starke, *loc. cit.*, at p. 342.

matter at hand, and is thought to transcend the maxim *pacta tertiis nec nocent nec prosunt*.<sup>44</sup> It is difficult to find a single crucial test for a *traité-loi*, but it is believed that the 'governing character' of a *traité-loi* may be manifested in provisions regarding capacity, procedure and prohibitions.

*Capacity*.—If a treaty were to modify the international capacity of one of the parties, such as reducing it to a dependency or protectorate,<sup>45</sup> it would rule out the legality of all future treaties between that party and third States which are inconsistent with the new status. It is maintained by some writers that by Article 20 of the Covenant, members of the League of Nations undertook to limit their capacity for international engagements not consistent with the Covenant.<sup>46</sup> The same may be said of Article 103 of the Charter of the United Nations.<sup>47</sup>

*Procedure*.—In every legal act, formal validity must be regarded as essential. A legal act can be distinguished outwardly only by its conformity to a prescribed procedure. Unless that procedure is followed, there can be no legal act. A rule stipulating a particular procedure would necessarily invalidate any act which does not conform to its requirements. Article 2 of the Pact of Paris in providing that international disputes should not be settled

<sup>44</sup> McNair, *loc. cit.*, p. 113; authorities cited in Hall, p. 7, n. 1; Cobbett, vol. I, p. 9, somewhat qualified at p. 10; Starke, *Monism and Dualism in the Theory of International Law*, 17 B.Y.I.L., 1936, p. 66, at p. 73. *Contra*, Hall, pp. 8, 12; Roxburgh, *op. cit.*, ss. 65-6; Gihl, *op. cit.*, pp. 52-63. It may be argued that to adhere strictly to the principle of *pacta tertiis nec nocent nec prosunt* would be to ignore the law-creating force of fact, expressed in the maxim *ex factis jus oritur*. It is useless to insist upon a 'legal right' from which the major force of the society has definitely withdrawn its support, even though the extinction of that right has not been assented to by the party in question. [In its Advisory Opinion concerning *Reparation for Injuries Suffered in the Service of the United Nations* (1949) the International Court of Justice disregarded the maxim *pacta tertiis nec nocent nec prosunt* in construing the right of the United Nations to sue a non-member: 'On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely recognised by them alone', *I.C.J. Reports 1949*, p. 174, at p. 185.]

<sup>45</sup> The precise distinction between a treaty for the limitation of capacity and a *traité-contrat* may not be easy. The former is to renounce a right, the latter a promise not to exercise it; the former is akin to conveyance, the latter to contract (Baty, *op. cit.*, p. 46 *et seq.*). It may be controversial whether the illegality of the *Anschluss* should be attributed to the lack of capacity on the part of Germany and Austria to effect a merger, or to the use of force by Germany, or both. See above, pp. 66-7. See other doubtful cases, Oppenheim, vol. I, p. 257, n. 3.

<sup>46</sup> Lauterpacht, *loc. cit.*, p. 60.

<sup>47</sup> Oppenheim, vol. I, pp. 806-7; Schwarzenberger, *op. cit.*, n. 55, p. 22 above, pp. 528-9; see also below, p. 438.



except by pacific means, makes duress a vitiating circumstance for treaties.<sup>48</sup> A treaty not made through this peaceful procedure cannot become a treaty according to law.

*Prohibition.*—A treaty which provides for a prohibition against certain types of acts or treaties should take precedence over those acts or treaties which it prohibits. This seems to be the view of the 'Harvard Research' in its Draft Convention on the Law of Treaties.<sup>49</sup> Article 20 of the Covenant of the League of Nations and Article 103 of the Charter of the United Nations make future treaties inconsistent with these two documents legal nullities. Likewise, the Declaration of Paris would invalidate any treaty between signatories of the Declaration concluded for the purpose of reviving privateering.<sup>50</sup>

A treaty possessing any or all of the above characteristics may be properly considered as a 'higher law' which invalidates incompatible obligations.<sup>51</sup> Professor Lauterpacht, while admitting that the Charter of the United Nations constitutes a superior law over all other treaties,<sup>52</sup> however, denies in an earlier work that the League Covenant can be so regarded.<sup>53</sup> Article 20 of the Covenant provides, in addition to the obligation not to enter into incompatible engagements, that members should take steps to procure release from inconsistent engagements previously entered into with non-members. It is argued by the learned professor that the invalidation of future inconsistent engagements is merely the application of the general principle of law that a previous obligation invalidates a subsequent obligation in conflict with it.<sup>54</sup> Assuming the correctness of this principle, it would follow that the Covenant itself should become void, once it has been estab-

<sup>48</sup> See also other treaties with similar provisions, above, p. 417. In another sense, this Article of the Pact may also be regarded as a provision respecting capacity, for the party under duress may be regarded as lacking a free will essential to contractual capacity. It may also be regarded as a prohibitory provision.

<sup>49</sup> Article 22(b), *loc. cit.*, n. 26 above, pp. 661, 1016.

<sup>50</sup> The recommendations of the International American Conference, April 18, 1890, contain the following article: 'Fourth, Any renunciation of the right to arbitrate made under the conditions named in the second section (*viz.*, the threat of war), shall be null and void' (Hill, *op. cit.*, p. 461). This may also be regarded as a limitation on capacity, as well as a prohibition.

<sup>51</sup> Treaties for general international settlement and international incorporation are also generally regarded as law-making (McNair, *loc. cit.*, pp. 112-7). They are so because they contain, expressly or impliedly, the three elements mentioned in the text.

<sup>52</sup> See his edition of Oppenheim, vol. I, pp. 806-7.

<sup>53</sup> Lauterpacht, *loc. cit.*, n. 26 above, p. 59.

<sup>54</sup> See discussions on this view, above, pp. 433-4.

lished that it is in conflict with an earlier right of a non-member. This has never been thought to be the case. It appears to the present writer that a treaty, which invalidates future obligations inconsistent with it and yet is not itself invalidated on the ground of inconsistency with a previous obligation, must be in the character of a 'higher law'.

Although it may be possible to designate certain treaties as law-making or as establishing a legal order, it is, however, not necessary that every departure from it should be automatically null and void.<sup>55</sup> It may be possible that the particular provision violated does not constitute a peremptory rule of law; or the members of the international society, for reasons of public policy, are not opposed to a change in the existing legal order and signify their assent through recognition. This last-mentioned circumstance is a question of legislation, not of law.

This idea that a legal order has reality only when, and so long as, it enjoys the support of the society is essential to the understanding of the doctrine of non-recognition. The doctrine assumes that such support exists under a given legal order.<sup>56</sup> The criticism that, by introducing the notion of duress into international law, there is danger that all future treaties of peace may be repudiated at the liberty of the defeated State,<sup>57</sup> fails to conceive the doctrine as one with variable contents. The doctrine has application only with respect to the legal order then existing. A peace treaty at the end of a general international war inaugurates a new legal order. The doctrine would then be used to uphold this new legal order, and not to repudiate it.

Assuming that there is a 'higher law' in the international society and that it is determinable according to certain tests, the question of application remains a difficult one, as long as an international tribunal with compulsory jurisdiction is lacking. In the absence of such a tribunal, the decision whether a law has been infringed must necessarily rest with individual States. This situation cannot be criticised<sup>58</sup> as having placed third States above the law-breaking State, which is by hypothesis their equal in law.

<sup>55</sup> See cases of violations of treaties in Williams, *loc. cit.*, pp. 280-1; Myers, *Violation of Treaties*, 11 A.J.I.L., 1917, p. 794, at p. 804 *et seq.*

<sup>56</sup> See above, pp. 421-2.

<sup>57</sup> Lowell, *Manchuria, the League and the United States*, 10 *Foreign Affairs*, 1932, p. 351, at p. 368; Borchard, in Wright, *op. cit.*, p. 158.

<sup>58</sup> Williams, *loc. cit.*, p. 282.

The practice of States to determine their own rights under international law is not a recent development.<sup>59</sup> What is new is only that the right claimed is a public right of a member of the society, instead of a private right of States against one another.<sup>60</sup> The judgment by third States may perhaps be not as impartial as by an international tribunal, yet it would at least be more disinterested than the judgments of the parties to the dispute. Moreover, justice can be better guaranteed if decisions should be taken in conjunction by a large number of third States, such as in the Assembly of the League of Nations or the General Assembly of the United Nations. The doctrine of non-recognition, coupled with a greater integration of international society, would certainly contribute to bringing international law from the stage of 'weak' law into a more mature development.

<sup>59</sup> Peaslee, *loc. cit.*, n. 8, p. 424 above, p. 328; Oppenheim, vol. I, pp. 13-4.

<sup>60</sup> See Jessup, *op. cit.*, n. 2, p. 416 above, p. 2.

## CHAPTER 32

### NON-RECOGNITION AS A SANCTION

IN maintaining the proposition that an act or treaty in conflict with a peremptory rule of international law is void, it is not suggested that the mere stigmatisation as illegal is sufficient to vindicate law without further effort. Non-recognition as a sanction exists only in legal concept. It does not alter a situation of fact, unless it is accompanied by the use of physical or moral force. It is an illusion that non-recognition can be a substitute for other more vigorous measures in the upholding of law.<sup>1</sup> Critics of the doctrine of non-recognition are at their strongest when they contend that non-recognition alone, unsupported by other sanctions, is ineffective.<sup>2</sup> But, on the other hand, any other sanction of law must be applied upon the assumption that the act or treaty which forms the object of the sanction is illegal, and has not yet been legalised. In other words, non-recognition forms the basic condition for the application of other sanctions. The function of non-recognition is to hold the legal situation in suspense, pending a definitive settlement which may result either in the restoration in fact of the *status quo ante*, or in the adjustment of law to the changed situation of facts. In the former situation, the doctrine of non-recognition would be fully justified, as it preserves the legal rights and duties of the parties. In the latter case, a change of law indicates that the doctrine of non-recognition has exhausted its usefulness acquired under the pre-existing legal order.

It has been a controversial question whether non-recognition itself constitutes a form of sanction. Though ineffective in the

<sup>1</sup> Such an illusion seems to have been entertained by the United States. See the speech of Acting Secretary Castle, May 6, 1932, quoted in Hill, *op. cit.*, n. 10, p. 412 above, p. 418; Middlebush, n. 21, p. 414 above, p. 46; Wallace, *How the United States 'Led the League' in 1931*, 39 *American Political Science Review*, 1945, p. 101, at pp. 104-5.

<sup>2</sup> McNair, *loc. cit.*, n. 20, p. 414 above, pp. 71, 74; Williams, *loc. cit.*, n. 90, p. 52 above, pp. 790-2; same, *loc. cit.*, n. 6, p. 422 above, p. 128; Borchard in Wright, *op. cit.*, n. 19, p. 414 above, p. 173; Moore, *loc. cit.*, n. 52, p. 114 above, p. 436; Hill, *op. cit.*, p. 397.

sense that it cannot be used to dislodge a wrongful occupant from a piece of territory and reinstate the rightful owner, non-recognition, by its incidence, may yet cause sufficient inconveniences and embarrassments to the wrongdoer to compel him to seek legalisation at considerable cost. The determined non-recognition by a large number of States would no doubt produce a deterrent effect upon would-be offenders. The inconveniences may partake of a legal, political, economic or moral character.<sup>3</sup> The interflow of commerce between the law-breaking State and the non-recognising States, even if not interdicted, would certainly be impeded for lack of security and governmental assistance. The territory in dispute would be open to reconquest by the injured State without infringement of law.<sup>4</sup> The fact of the refusal to recognise amounts in fact to a moral indictment.<sup>5</sup>

The application of the doctrine of non-recognition is naturally accompanied by a certain measure of uncertainty in international legal relations,<sup>6</sup> as it keeps open a gap between law and fact. But it is the violation of the law, and not its upholding, which is the cause of this uncertainty. The very principle of certainty would be jeopardised, if States were assured, or were encouraged to believe, that every act of illegality would receive prompt legalisation. For this reason, if for no other, more forceful means of enforcing law against possible violations must be regarded as the true guarantee of certainty and stability. But every effort at the vindication of law and the restoration of injured rights would be lost, unless in the meanwhile there were no legalisation of the illegal act. Non-recognition, standing alone, is indeed ineffective as a sanction, but it is indispensable for the application of any other form of sanction.

It cannot be denied that the application of the doctrine of non-recognition has not been attended by unqualified success. But the failure is due not so much to the doctrine itself, as to the weakness of the law behind it. Although we should not minimise the basic difference between the structures of inter-

<sup>3</sup> Langer, *op. cit.*, n. 28, p. 60 above, p. 116; speech of M. Litvinov, Soviet delegate, at the League of Nations Council, May 12, 1938 (L.o.N. Off. J., 1938, p. 340).

<sup>4</sup> See above, p. 432.

<sup>5</sup> Williams, *loc. cit.*, n. 35, p. 123 above, p. 310; Acting Secretary Castle's speech quoted in Hill, *op. cit.*, p. 417.

<sup>6</sup> For criticism of the doctrine of non-recognition on this score, see Moore, *loc. cit.*, p. 436; Middlebush, *loc. cit.*, p. 54; Borchard in Wright, *op. cit.*, p. 157.

national and intra-national communities,<sup>7</sup> yet the human society is painfully aware of the fact that greater international integration after the pattern of municipal systems is the only alternative to continuous war and the eventual extinction of civilisation, if not, indeed, of the human race. The doctrine of non-recognition, which postulates the responsibility of every State for the maintenance of the legal order, signifies the conviction of the States that the law exists. The failure of its application in any particular instance is strong argument that greater, and not less, collectivisation and strengthening of the authority of international law is needed for the peaceful enjoyment of life in the world. To advocate the view that, because in the past the international society has been too weak to enforce its will upon law-breakers, so law-breaking in future shall receive immediate acknowledgment of the society is a policy of despair and a condemnation of international society to a perpetual state of anarchy. On the other hand, it must always be borne in mind that the usefulness of the doctrine is limited by the margin of superiority of the force of the society over would-be offenders. Forlorn and hopeless clinging to the empty formula of non-recognition after the social force has been withdrawn from its support would merely keep alive false hopes without the prospect of realisation, and would only bring disrepute upon international law. While it is maintained that the doctrine of non-recognition is indispensable to international legal order, it must also be realised that it is the force which sustains this international legal order that gives flesh and bones to the doctrine. The application of the doctrine must therefore always be kept within the limits of the effective strength of the society. The great problem is, in the last analysis, the building up and the strengthening of this social force.

<sup>7</sup> See Brierly, *The Outlook for International Law*, 1944, p. 39 *et seq.*



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